132-340

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~288~~ 34

JOSEPH E. YOUNG, APPELLANT,

vs.

THE TOWNSHIP OF CLARENDON AND THE MICHIGAN AIR LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED JUNE 11, 1888.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 14, 1888.

1 *Bill of Complaint.*

In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

To the judges of the said court:

Your orator, Joseph E. Young, who is a citizen of the State of Illinois and a resident of the city of Chicago, in the State of Illinois, brings this his bill of complaint against the Michigan Air Line Railroad Company, a corporation organized under the railroad laws of the State of Michigan and a citizen and resident of the State of Michigan, and the Township of Clarendon, a political corporation and one of the divisions of the county of Calhoun, in said State of Michigan, a citizen of Michigan and a resident of said district; and thereupon your orator complains and says:

1st. That on the nineteenth day of February, 1884, your orator brought suit in the circuit court of the United States for the eastern district of Michigan against said Michigan Air Line Railroad Company on certain coupons for installments of interest on certain money bonds issued by said company on January first, 1870, and owned by your orator.

2nd. That subsequently and on the 11th day of November, 1884, after a trial and verdict in favor of the plaintiff in said cause, a judgment was rendered in said action in favor of your orator and against the said Michigan Air Line Railroad Company for the sum of $355,865.24, which judgment, as shown on the face thereof, bears interest at the rate of eight per cent. per annum.

3rd. That on the 12th day of November, 1884, your orator, as such plaintiff, sued out of said United States circuit court an execution on the said judgment in the usual form against the goods and chattels, lands and tenements, of the said Michigan Air Line Railroad Company, and on the same day delivered said execution to the marshal of the United States for the eastern district of Michigan, Mr. S. S. Matthews, to be executed according to its tenor, the said execution being directed to the marshal of said district, and that being the district in which said company then had its principal offices and residence, and the said execution was returnable on the 3rd day of December, 1884.

4th. That afterwards and on the 4th day of December, 1884, the said marshal returned the said execution wholly unsatified, and the same was then deposited and filed in the clerk's office of the said court.

5th. And the said judgment still remains in said court in full force and effect, and no proceeding has been had to reverse the same, and the same still remains wholly unpaid and unsatisfied

2 in the following return, which was endorsed on the said execution, to wit:

"EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify & return that I have made diligent search for goods and chattels, lands & tenements, belonging to the within-named defendant, but can find none in my bailiwick whereon I can levy and from the sale of which I can make the money as within commanded or any part thereof, and therefore, on this 4th day of December, A. D. 1884, I return the within writ *nulla bona*, wholly unsatisfied.

S. S. MATHEWS,
U. S. Marshal."

And the whole amount of said judgment from its date, with interest at the rate of eight per cent. per annum, is now due and payable to your orator.

And the said coupons, for which said judgment was rendered in your orator's favor, and the bonds from which said coupons were taken were given to your orator by the said R. R. Co. to pay your orator for money due him for constructing a portion of the railroad hereinafter mentioned for said company.

6th. And your orator further shows that the other defendant hereto, The Township of Clarendon, is justly and equitably indebted to the said defendant, The Michigan Air Line Railroad Company, and this bill is brought for the purpose of subjecting the equitable assets of the Michigan Air Line Railroad Company to the payment, as far as they will go, of your orator's said judgment, and the said equitable indebtedness of said township to said railroad company arose and still exists substantially as hereinafter set out.

7th. The Michigan Air Line Railroad Company was a corporation organized under the laws of Michigan on the 28th day of August, 1868, by the consolidation of two railroad companies previously duly organized under the names, respectively, of the Grand Trunk Railway Company of Michigan and the Grand Trunk Railway Company of Northern Indiana, which said Michigan Air Line Railroad Company then and there became and was a duly organized railroad company under the laws of Michigan, and it was organized for the purpose of constructing and operating a line of railway from Ridgeway, in the State of Michigan, to the dividing line between the State of Indiana and the State of Illinois on the route to Chicago, in the last-named State, but the said company did not at the time of its formation by said consolidation as aforesaid own or operate any railroad, as none had been constructed by either of the constituent companies, but the said company was formed as aforesaid for the purpose of constructing a railroad, as above set out, if its corporators should thereafter deem it expedient and advisable so to do; that said company undertook and continued said work of constructing said railroad, as hereinafter set out, down to the 8th day of October, 1870, on which day a consolidation under the statute of Michigan in such cases provided was formed by said Michigan Air Line Railroad Company, so formed on the 28th day of August, 1868, as herein-

3 before set out, with the St. Joseph Valley Railroad Company, the two companies together forming a continuous line, which consolidated company continued under the name of the Michigan Air Line Railroad Company, and this said company immediately proceeded with the work of the old and continued the work of completing the construction of said railroad the same as if there had been no change, and rapidly carried said work forward to completion, as more particularly set out hereinafter.

Hereafter, in the course of this bill, the said companies, the Michigan Air Line Railroad Company, will be referred to as "said company" or "said Michigan Air Line Railroad Company," it being understood that all allegations referring to said company relating to any time prior to the 8th day of October, 1870, refer to the company so formed on the 28th day of August, 1868, as hereinbefore stated, and all allegations relating to any time subsequent to said 8th day of October, 1870, refer to the company so formed on the 8th day of October, 1870.

8th. That when said company was organized as aforesaid out of said constituent companies, on August 28th, 1868, the Legislature of Michigan was soon to convene, and it was contemplated and generally understood that the act hereinafter, in paragraph number 10, mentioned was to be introduced in said Legislature at its approaching session and would become a law, and the promoters and corporators of said company intended to construct said railroad only in the event that said act should become a law, and the municipalities on the projected line of said road should grant such amount of aid to such road pursuant to the provisions of said act as would warrant said company in undertaking the construction thereof; all of which was well known to the citizens of said township of Clarendon and to all others interested in the construction of said road, and there was nothing in the law under which the said company was organized or in any law of Michigan which imposed on said company the duty to construct said road otherwise.

9th. At the time of the organization of the said company as aforesaid, August 28th, 1868, said township of Clarendon and the whole region of country along said projected line of railroad did not possess such railroad facilities as their products and business interests rendered desirable, and the construction of said projected road by said company was understood and believed by the people living on the projected line thereof and by the citizens of the said township of Clarendon to be of special pecuniary benefit to them and also of great public benefit.

10th. In view of the lack of railroad facilities above stated and a similar lack of railroad facilities in many other portions of the State of Michigan, which it was then impossible to supply without aid from the townships and municipalities interested, and in order to promote the welfare of the State by increasing the number of railroads within its borders, the Legislature of the said State passed an act entitled "An act to enable any township, city, or village to pledge its aid by loan or donation to any railroad company now chartered or oganized or that may hereafter be organized under and by virtue

of the laws of the State of Michigan in the construction of its road," which act was approved by the Governor, and took effect
4 March 22, 1869, and a copy of which act is hereto attached, marked Exhibit "A."

11th. Afterwards, to wit, on the 21st day of June, A. D. 1869, the electors of the said township of Clarendon, in order to procure the construction and operation of said railroad and as an inducement to said Michigan Air Line Railroad Company to construct and operate it, voted to pledge the aid of said township to said company to the extent and upon the terms and conditions following—that is to say, "the faith and credit of the township of Clarendon, in the county of Calhoun, in the State of Michigan, is hereby pledged to aid the Michigan Air Line Railroad Company in the construction of its road by a loan of the sum of ten thousand dollars, upon the terms and conditions following:

1st. That the bonds of said township, payable at the time hereinafter specified and bearing an annual interest of ten per cent., shall be received by the said railroad company at their par value in payment of said loan

2nd. That the said company receiving the said bonds from the State treasurer in the manner provided by law shall pay yearly to the said township on the amount so loaned a sum equal, *pro rata*, to the dividends from year to year paid to the stockholders of the said company, such dividends being ten per cent. or less, the said payments to be deemed and received as and for the annual interest on the amount loaned, and in case such dividend shall exceed ten per cent. then the amount of the excess over ten per cent. shall be applied to reduce the said principal sum until it shall be thereby fully paid, an agreement to which effect shall be executed by said railroad company.

3rd. That the said railroad shall be and remain located and be constructed through the said township of Clarendon.

4th. That the bonds to be issued by said township shall be of such denominations, not exceeding one thousand and not less than one hundred dollars each, as the said railroad company shall request; that coupons shall be annexed for the annual interest; that such bonds and coupons shall be subscribed by the supervisor and clerk of said township, and the same shall be drawn payable at the office of the treasurer of said county of Calhoun, and of the entire amount of the bonds one-tenth shall become payable on the first day of March, in the year one thousand eight hundred and seventy-one, and one-tenth on the first day of March in each of the nine succeeding years.

In case that the said railroad company shall not have completed its road-bed and ironed its road through the said township of Clarendon in time to receive the said bonds by the first day of December, in the year 1869, or by the first day of October in any succeeding year, then the time of the payment of the bonds first growing due shall be postponed so that one-tenth of the principal sum shall become due on the first day of March in each year of the ten years which shall next succeed the time of the completion of said road-

bed and the ironing of said road as aforesaid, and the additional coupons which may be necessary to provide for the payment of annual interest shall be attached to the bond, the payment of which may be postponed, the interest which shall accrue to the time when the first installment of the principal becomes due to be paid on the same day and annually thereafter.

Said aid is pledged under the provisions of and subject to all the restrictions of an act entitled An act to enable any township, city, or village to pledge its aid by loan or donation to any railroad company now chartered or organized or that may hereafter be organized under and by virtue of the laws of the State of Michigan in the construction of its road, approved March 22, 1869."

Said aid was voted at a meeting of the electors of said township of Clarendon called by Peter Mitchell, then supervisor of the said township, pursuant to request in writing to him so to do, made by upwards of thirty tax-paying electors of said township, public notice of the meeting having been given at least twenty days previous to holding it by posting the said notices in five of the most public places in said township and by advertising the same in the Democratic Expounder, a newspaper published in said county of Calhoun, at least once in each week for three successive weeks next previous to the holding of such meeting, there being no newspaper published in the said township of Clarendon. The said request that such meeting be called and the said notice thereof each specified the amount of aid, the conditions, rate of interest, the time of payment and manner of executing the bonds, as by said request and notice, when produced and proved as the court shall direct, will more fully appear; said meeting was the first one held by the said township under the provisions of said act, and was called in all respects in conformity to section 2 of said act, and was conducted and held in all respects in conformity to the provisions of section 3 of said act.

The total amount of outstanding indebtedness, exclusive of interest thereon, of said township of Clarendon incurred for any and all railroads, including said ten thousand dollars, did not then exceed 10 per cent. of the assessed valuation then last made of the real and personal property in the said township, and the amount, exclusive of interest thereon, including the aid voted as aforesaid, to become due or collectible in any one year did not exceed 2 per centum of of the assessed valuation of said township at the time of issuing the said bonds and coupons for said aid, as hereinafter stated.

At about the same date last aforesaid other municipalities and townships on or near the line of said railroad as projected, acting under and pursuant to the provisions of said act, voted similar aid to said railroad company as follows, to wit: The township of Lockport, 40 thousand dollars; the township of Concord, 15 thousand dollars; township of Homer, 10 thousand dollars; township of Tekonsha, 15 thousand dollars; township of Union, 25 thousand dollars; the city of Jackson, 50 thousand dollars; township of Nottawa, 25 thousand dollars; township of Niles, 20 thousand dollars; township of Penn, 15 thousand dollars; township of Calvin, 20 thousand dol-

lars; the city of Niles, 50 thousand dollars; the township of Newberg, 12 thousand dollars; township of Colon, 25 thousand dollars.

12th. In pursuance of said act of the Legislature of the State of Michigan and the action of the electors of the said township of Clarendon and of its voters as aforesaid, and within sixty days after such action, to wit, on the 20th day of July 1869, the said
6 Township of Clarendon issued, under its seal, its coupon bonds, each bearing date July 20th, 1869, and each payable at the office of the county treasurer of Calhoun county and each subscribed by the supervisor and clerk of said township, in and by which the said township agreed, absolutely and without condition, to pay to the Michigan Air Line Railroad Company or bearer the amount of the aid so voted as aforesaid.

The numbers, amounts, and dates of maturing of said bonds are as follows: Bonds numbered from 1 to 2, inclusive, for the sum of five hundred dollars each, and each due March 1st, 1871; bonds numbered from 3 to 4, inclusive, for the sum of five hundred dollars each, and each due March 1st, 1872; bonds numbered from 5 to 6, inclusive, for five hundred dollars each, and each due March 1st, 1873; bonds numbered from 7 to 8, inclusive, for five hundred dollars each, and each due March 1st, 1874; bonds numbered from 9 to 10, inclusive, for five hundred dollars each, and each due March 1st, 1875; bonds numbered 11 and 12, $500 each, each due March 1st, 1876; bonds numbered 13 to 14, $500 each, each due March 1, 1877; bonds numbered 15 & 16, $500 each, each due March 1st, 1878; bonds numbered 17 & 18, $500 each, each due March 1st, 1879; bonds numbered 19 & 20, $500 each, each due March 1st, 1880.

Each of said bonds bore interest at 10 per cent. per annum, payable annually, at the office of the county treasurer of — county, and to each of said bonds were attached interest coupons in the usual form, corresponding in dates and numbers with the bonds to which they were attached and signed by the written signatures of the said supervisor and clerk, for the interest to become due thereon, there being a coupon on each bond for each year's interest, payable on the 1st day of —— of each year.

And at or about the date last aforesaid said township of Lockport and the several townships and cities that had voted aid as aforesaid likewise severally made and executed their bonds and coupons, and for the amounts, respectively, hereinbefore set out.

13th. Afterwards, to wit, on the 23rd day of July, 1869, said Township of Clarendon, pursuant to the action heretofore set out and the provisions and terms of said act of March 22, 1869, caused to be delivered the said bonds and coupons, to wit, at the city of Lansing, the capital of said State of Michigan, to E. O. Grosvenor, then treasurer of said State, to be by him, as such treasurer, held as trustee for the said township of Clarendon and the said railroad company, on the terms and conditions of said act, and the said Grosvenor, as such treasurer, then and there so accepted and received said bonds and coupons, and the same were registered, as required by section six of said act. On the first day of January, 1871, the term of office

of said Grosvenor as such treasurer expired and Victor P. Collier succeeded him as such treasurer of said State and continued to hold said office and discharge the duties thereof for the period of two years and upwards then next ensuing; and he then and there, as such treasurer, received and accepted said bonds and coupons, to be by him held in trust for the said township of Clarendon and said railroad company, upon the terms and conditions specified in said act; and it then and there became and continued to be his
7 duty, as such treasurer, to hold said bonds and coupons under said trust and to dispose of the same as in said act provided.

Said township of Lockport and said several townships and cities voting aid and making their bonds in that behalf as aforesaid also delivered such bonds to said treasurer, Grosvenor, to be held and disposed of by him and his successors in office pursuant to the provisions of said act, to wit, at or about the same time as the delivery of the said bonds and coupons of the said township of Clarendon to him as aforesaid.

14th. Said railroad company was informed of the action of the said township of Clarendon in voting said aid, and of the similar action of the other townships and cities aforesaid, and in consideration of such aid so voted, and in reliance thereon, and on the issue and delivery of bonds in pursuance thereof, as was well known to said township of Clarendon, the said railroad company afterwards, to wit, on the 1st day of August, A. D. 1869, entered upon the construction of said railroad, including all bridges, culverts, cattle-guards, freight and passenger stations, and all the other buildings and apparatus needed and used in the operation of a railroad; and the said railroad company began such construction at the junction of said road with the Michigan Central railroad, at the city of Jackson, Michigan, and at the junction of the said road with the Michigan Central railroad at the city of Niles, Michigan, and at various other points on the line thereof between said two points, and by the 26th day of May next thereafter said company had so far progressed with the work of constructing said road that it had practically acquired its entire right of way between Jackson and Niles. The larger part of the grading of the road-bed was completed between these two points, the iron for the rails was contracted for and was then being delivered, the ties were purchased and being delivered, and work was being pushed all along the line between said points, and said company had made contracts for the requisite rolling stock to properly equip the road and operate business upon said road, and had expended in so constructing said railroad a large sum of money, to wit, the sum of one million dollars and upwards.

15th. On the 26th day of May, A. D. 1870, the supreme court of the State of Michigan, in the case of "The People against The Township of Salem," adjudged and declared said act of the Legislature of March 22nd, 1869, to be void, which case is reported in 20th Michigan Reports, page 452.

16th. The said Michigan Air Line Railroad Company having previous to the time of said decision entered upon and proceeded in the work of constructing said railroad to the extent set out in para-

graph 14, hereinbefore set out, and having taken the steps set out in said paragraph looking to the operation of said railroad, and having expended said large sums of money, as therein set out, for the purposes therein set out, could not discontinue the same and abandon the construction of said road without suffering thereby a pecuniary loss greater than the aggregate sum of the aid voted to it as aforesaid, and it continued the construction of said road notwithstanding the said judgment of the supreme court of Michigan, and on the 1st day of February, A. D. 1871, said company had fully completed the construction of said railroad from its
8 junction at Jackson with the Michigan Central railroad, a railroad duly completed and in full operation to its junction with the said Michigan Central railroad at Niles, a distance of upwards of 107 miles and running through the said township of Clarendon; and, by the date aforesaid, the said company had fully ironed the said railroad from Jackson to Niles aforesaid, with the usual "T" rail, and had properly equipped it and was regularly operating business upon it, and said line has continued to be operated until the present time, and has up to the present day fully subserved the ends desired to be reached in its construction and to secure which the several cities and towns voted aid as aforesaid.

17th. And the said company, previous to the 1st day of February, 1871, had fully constructed and ironed the said railroad through the said township of Clarendon, and the complainant avers that, by reason of the non-completion of said road before the 1st of Oct., 1870, the time of payment of each bond and coupon was postponed one year, and the said Michigan Air Line Railroad Company, to wit, at the time of the delivery of said bonds to the State treasurer as aforesaid, had duly executed and delivered to the said township of Clarendon the agreement specified and provided for in the 2nd paragraph of the terms and conditions on which said aid was voted, as hereinbefore set out in paragraph number 11th of this bill, and had done and performed every condition precedent to the earning of the said bonds and coupons, and had become fully entitled to have the same delivered to the existing company by the State treasurer of Michigan, except that it had not secured a certificate of the Governor of Michigan, as required by said act.

18th. As sections of said railroad were completed from time to time, so as to entitle said company to the certificate of the Governor of Michigan and to the possession of the bonds issued by the said various towns and cities, said company applied to the Honorable Henry P. Baldwin, then Governor of said State, and exhibited to him positive proofs that said company had fully earned said bonds and coupons, according to the terms and conditions on which they were voted, and requested him to make and issue to it his certificate that it had in all respects complied with the provisions of said act of March 22, 1869, and was entitled to the bonds and coupons issued in that behalf and deposited with said treasurer, which certificate it was then and there the duty of said Baldwin, as such Governor, he then and there well knowing the premises, to give in pursuance of said act; and the said company, after earning the said bonds and cou-

pons so issued as aforesaid by the said township of Clarendon and, to wit, on the 1st day of February, 1871, applied to the said Baldwin, Governor, for his certificate for said bonds and coupons as aforesaid, exhibiting to him said proofs as aforesaid, but he, the said Governor, refused each of said requests, and particularly the request for his certificate relative to the bonds and coupons of the township of Clarendon, although he then and there well knew and admitted that said railroad company was, in fact, fully entitled thereto and to said bonds and coupons by reason of the premises; and the said Governor gave as his sole reason for refusing each of said requests
9 that he had been informed of said judgment of the supreme court of Michigan. By reason of said refusal said company was unable to obtain said certificate, and has since hitherto been unable to obtain the same for the reason set out above and for no other reason.

19th. Subsequently and, to wit, on May 28, 1872, the said township of Clarendon, knowing the premises and without the knowledge or consent of said railroad company and contrary to law and equity and in violation of the trust aforesaid and in fraud of said company's rights to said bonds and coupons, induced the State treasurer, who well knew all the facts hereinbefore set forth, and in breach of his duty and trust aforesaid and in fraud of said company's rights, to surrender up and deliver to said township of Clarendon all said bonds and coupons, and said township has since retained and withheld them from the possession of said company.

20th. Neither of the said Michigan Air Line Railroad Companies has ever earned or paid any dividend to its stockholders.

21st. By reason of the premises and the said fraudulent conduct on the part of the township of Clarendon the said railroad company has hitherto been deprived of all benefit and advantage, legal or equitable, of said aid so voted by said township towards the construction of said railroad and of all benefits and advantage of said bonds and coupons.

22nd. Said bonds and coupons, by reason of all the premises, became in justice and equity the property of said railroad company and the said township of Clarendon became in equity and justice bound to pay the same to the said railroad company according to the tenor and effect thereof, but this duty and obligation the said township of Clarendon has hither- wholly neglected and disregarded, by reason of which the said railroad company has been hitherto wholly unable to liquidate the demand of your orator hereinbefore set out or pay the judgment obtained on said demand, as hereinbefore set out.

23rd. By reason of the premises your orator alleges and charges that the said township of Clarendon is equitably indebted to the said Michigan Air Line Railroad Company, the other defendant herein, to the whole amount of said bonds and coupons, with the interest thereon up to the present time, and that the said indebtedness ought to be subjected to the payment of your orator's judgment as aforesaid, as far as it will go.

And your orator alleges that this bill is not established by col-

lusion with the defendants or either of them or for the purpose of protecting the property or effects of the debtor against the claims of other creditors, but for the sole purpose of compelling payment and satisfaction of your orator's said judgment.

24th. In consideration of the premises your orator prays that the said defendants do appear and answer this bill and all the matters hereinbefore set out, but not upon oath, their answer under oath being hereby expressly waived.

25th. That this court will adjudge and declare that the said railroad company fully earned said bonds and coupons and was entitled thereto at the time of the completion of the performance of the conditions on its part, and that, in justice and equity, said bonds and coupons belong to the said company, and that the said township of Clarendon is equitably endebted to the said railroad company in the whole amount of the said bonds and coupons, with the interest thereon to the present time.

26th. That this court declare and adjudge that the said township of Clarendon obtained the said bonds from the treasurer of Michigan in fraud of the rights of the said railroad company.

27th. That this court will ascertain the amount equitably due by reason of the premises from the said township of Clarendon to the said railroad company, and grant to your orator a decree that the said township of Clarendon pay said amount to your orator towards the satisfaction of his said judgment against said railroad company.

28th. That your orator may have such other or further relief as the premises will warrant and as shall be agreeable to equity.

29th. That a writ of subpœna, in the usual form, issue out of this court, directed to the Township of Clarendon and the Michigan Air Line Railroad Company, commanding them to appear and answer this bill, etc.; and your orator will ever pray.

JOSEPH E. YOUNG,
By ALFRED LUCKING,
His Solicitor.
ALFRED LUCKING,
Sol'r for Complainant.
WM. C. MAYBURY,
JNO. D. CONELY,
Of Counsel.

11 EXHIBIT A. No. 45.

An act to enable any township, city, or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized, or that may hereafter be organized, under and by virtue of the laws of the State of Michigan, in the construction of its road.

SECTION 1. The people of the State of Michigan enact, That it shall be lawful for any township or city to pledge its aid to any railroad company now chartered, organized, or that may hereafter be organized, under and by virtue of the laws of the State of Michigan, in the construction of its road, by loan or donation, with or without

conditions, for such sum or sums, not exceeding ten per centum of the assessed valuation then last made of the real and personal property in such township or city, as a majority of the electors of such township or city voting shall, at a meeting or meetings called for that purpose, determine: Provided, That the total amount of outstanding indebtedness, exclusive of interest thereon, of any such township or city incurred for any and all railroads shall not exceed ten per cent. of the assessed valuation of the same at any one time: Provided, That the amount, exclusive of interest thereon, which shall become due or collectible in any one year shall not exceed two per centum of the assessed valuation of such township or city at the time of issuing the same: And provided further, That the total amount which the city of Detroit may raise for such purposes shall not exceed five per centum of the assessed valuation of the real and personal property of said city.

SEC. 2. It shall be the duty of the supervisor of any township and the mayor of any city to call a meeting or meetings of the electors of their respective township or city whenever a request in writing to do so shall be made by thirty tax-paying electors of such township or city, and to give public notice thereof, at least twenty days previous to holding such meeting, by posting the same in not less than five of the most public places in such township or city, and by the advertisement of the same in some newspaper published in the county wherein such township or city shall be, provided, in the case of cities or townships in which a daily or weekly newspaper shall be published, such publication shall be made in such newspaper at least once in each week for three successive weeks next previous to the holding of such a meeting; and provided, in the case of the city of Detroit, such notice shall be published in at least three daily newspapers for ten consecutive days previous to the holding of such meeting; such request and notice shall specify the amount of aid, the conditions, rate of interest, the time of payment and manner of executing the bonds, and other particulars in regard to such aid not otherwise provided herein: And provided further, That no township or city shall, under the provisions of this act, hold more than two meetings in any one year, unless a majority
12 of the tax-paying electors of such city or township shall sign such request in writing therefor.

SEC. 3. At such meeting or meetings the township, city, or ward inspectors of elections shall act as inspectors of election. The electors shall vote by ballot, such ballot to contain the words "Aid to railroad—yes," or "Aid to railroad—no," as the case may be, and shall be subject to challenge as at other township or city elections, and the proceedings at such meetings to be held under the provisions of this act, shall, in case of townships, be governed, so far as they may be applicable, by the general laws of this State relating to township elections, and in the case of cities by the laws regulating their respective municipal elections, and illegal and fraudulent voting shall be punishable in the same manner and to the same extent as at other township or city elections. A copy of the request, and also of the notice required by the provisions of section two of

this act shall be entered at large upon the records of the township or city, together with a statement of the result and other essential particulars, and a certified copy of such record shall be in all courts and places *prima facie* evidence of the facts therein set forth.

SEC. 4. Any township or city that may avail itself of the benefits of this act by voting aid to any railroad company, as provided herein, shall within sixty days after the question of aid is determined by a vote of the electors of such township or city, as provided in section three of this act, issue its coupon bonds for the amount so determined to be granted, which bonds shall be in sums of not less than one hundred dollars each and not more than one thousand dollars each, and shall be payable at any time as determined upon by the electors of such township or city, not exceeding twenty years from the date thereof. Such bonds shall bear interest at the rate of not exceeding 10 per cent. per annum, and shall have attached thereto the necessary and usual interest coupons, corresponding in dates and numbers with the bonds to which they are attached, which shall be signed by written signatures by the same person or persons executing such bonds. Such bonds shall, if issued by a city, be executed by the mayor and clerk or recorder thereof, as the case may be, under the seal of said city; and if issued by a township they shall be executed by the supervisor and clerk thereof; and if any city or township issuing such bonds shall have a seal the same shall be impressed upon each of such bonds. The bonds and coupons attached thereto shall be payable at the office of the treasurer of the county in which such township or city may be situate.

SEC. 5. Whenever any such bonds as provided by provisions of this act shall have been issued as therein specified the same shall be delivered by the person, persons, or officers having charge of the same to the treasurer of this State, who shall give a receipt therefor and hold the same as trustee for the municipality issuing the same and for the railroad company for which they were issued, and to be disposed of by said treasurer in discharge of his trust as hereinafter provided.

SEC. 6. Upon receipt of any such bonds from any township or city in aid of any such railroad company the treasurer of
13 of this State shall immediately register or record the same in a book or books to be kept by him for that purpose in his office, which record shall show the amount, date, and number of each bond, the rate of interest which it bears, by what township or city issued, to the benefit of what railroad company the same are issued, and the time when payable, which record shall be always open for the inspection of any citizen of this State or other interested person. Such bonds shall be safely kept by such treasurer for the benefit of the parties interested and be disposed of by him in the following manner—that is to say, whenever any railroad company, in aid of which any of such bonds may have issued, shall present to said treasurer a certificate from the Governor of this State that such railroad company has in all respects complied with the provisions of this act and is thereby entitled to any of such bonds,

the same or such of said bonds as said company shall be entitled to receive shall be delivered to said company, the treasurer first cutting therefrom, cancelling, and returning to the municipality the past-due coupons. The treasurer shall endorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time when so delivered; and the treasurer shall notify the clerk of the township or recorder or clerk of the city issuing the same of the date of the delivery of its bonds to such railroad company. The railroad company so receiving such bonds shall pay the State treasurer one-tenth of one per centum of the par value of all such bonds so delivered, which shall be received by him in full payment of all fees and charges for the custody, recording, indorsing, and delivery of said bonds, which money shall be paid into the State treasury; and in case any bond so delivered to said treasurer by any such township or city shall not, within three years from the time when the same were received by him, be demanded in compliance with the terms of this act the same shall be cancelled by said treasurer and returned to the proper officers of the township or city issuing the same.

SEC. 7. In case any city or township issuing bonds as heretofore provided in this act shall fail to pay the bonds or the interest coupons or to deposit with the treasurer of the county in which such township or city is situated a sufficient sum of money to pay the bonds or the coupons which it may have issued as aforesaid which may then be due as by the terms of said bonds or coupons, the county treasurer of such county shall certify the same to the clerk of the board of supervisors of such county, or, in case of the city of Detroit, to the assessor thereof, stating the amount so due and unpaid by such township or city, whereupon the board of supervisors of such county or such assessor, as the case may be, shall cause the same to be assessed, levied, and collected from such township or city with other county or city taxes, and in like manner adding to the amount thereof interest, at the rate specified in said bond, for one year, and the same shall be paid to the county treasurer by the treasurer of such township or city; and upon the receipt of such money the county treasurer shall pay to the holders thereof the principal or interest for which such money may have been collected, with interest thereon, and cancel and return such bonds or coupons to the township or city to which the same may belong.

14 SEC. 8. In case any township or city shall avail itself of the benefits of this act by the issue of bonds or other evidence of debt in the aid of any railroad company, as by this act provided, such township or city shall each year, by its proper authorities, after receiving the notice, as herein provided, from the State treasurer of the delivery of its bonds to the proper railroad company, so long as such bonds or other evidence of debt remain unpaid, levy, assess, and collect upon the taxable property of such township or city a sufficient sum of money to pay all bonds or interest upon the same, as either the bonds or interest thereon shall become due, and the full faith and credit of any township or city so issuing any such bonds or other evidence of debt is hereby pledged for the full pay-

ment of both principal and interest thereon, and the same are made hereby valid and legal charge upon the taxable property of the township or city issuing the same.

SEC. 9. No such bonds or other evidence of indebtedness shall be delivered to such company until it shall have complied with the conditions voted and completed its road-bed and ironed its road with the usual T, or such other rail as may be used by first-class railroads, through the municipality issuing the same, or to the termination thereof, if said road shall terminate therein, nor until said company shall have completed their road as aforesaid through such municipality, or from the termination of said road, if it terminates therein, to some connecting line or railroad duly completed and in full operation, or to the initial or starting point of such road; and in case such bonds shall have been issued by a municipality not upon the line of such road the same shall not be delivered until said road shall be completed and ironed as aforesaid through the municipality adjoining thereto: Provided, That in case of the voting by aid by any township or city located six miles or more from any part of said railroad, no such bonds shall be delivered until at least twenty miles of said road-bed and railroad shall have been completed and ironed as aforesaid from the terminus of said railroad nearest to such aiding city or township: And provided further, That in the case of the termination of said railroad, or the making of such crossing or intersection of another railroad within the limits of any such aiding municipality, such bonds may be delivered when the said road-bed and railroad shall have been completed and ironed as aforesaid for the distance of six miles from such terminus or point of intersection.

SEC. 10. The provisions of this act are hereby extended so as to authorize any incorporated village to vote aid to the extent, in the manner, and subject to the conditions and provisions of this act in relation to cities. In case any township has not voted such aid any village formed in whole or in part from such township may vote such aid, and when any such village has voted such aid it shall not be liable to a further tax for that purpose by a vote of the township, and it shall be the duty of the president of any village to call a meeting or meetings of the electors of his village, as provided in section number two of this act, for cities and townships. The bonds contemplated in this act, if issued by a village, shall be executed by the president and clerk or recorder thereof, as the case may be, as provided for cities and townships in section number four of this act: Provided, That whenever a village has not voted aid to the full extent of the provisions of this act a further aid by township or village may be granted to an amount equal to the difference between the aid already granted and the full amount permitted by the provisions of this act.

SEC. 11. This act shall take immediate effect.

Approved March 22, 1869.

Security for Costs.

In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG, Compl't,
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD COMPANY, Def'ts.

I hereby acknowledge myself to be security for all costs for which the complainant herein may be liable in this suit.

Dated January 27th, 1885.

H. O. BEDELL.

Endorsed: The circuit court of the United States for the eastern district of Michigan. Joseph E. Young, complainant, *vs.* The Township of Clarendon *et al.*, defendants. Bill of complaint. Filed Feb. 24, 1885. Walter S. Harsha, clerk. Alfred Lucking, sol'r for complainant. Wm. C. Maybury, John D. Conely, of counsel.

16 *Subpœna with Proof of Service on Township of Clarendon.*

Circuit Court of the United States of America for the Sixth Circuit and Eastern District of Michigan, Sitting in Chancery.

The President of the United States of America to the Township of Clarendon, Calhoun county, and the Michigan Air Line Railroad Company, both of whom are citizens of Michigan and residents of said district:

You are hereby commanded to be and appear in the circuit court of the United States of America for the sixth circuit and eastern district of Michigan, sitting in chancery, before the judges thereof, at the district court room, in the city of Detroit, on the first Monday of April next ensuing, then and there to answer unto a bill of complaint exhibited against you as defendant by Joseph E. Young, a citizen and resident of Illinois, as complainant, and this you shall in nowise omit under the penalty of one thousand dollars.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

WALTER S. HARSHA, *Clerk.*

MEMORANDUM.—The above-named defendants are required to enter their appearance in this suit with the clerk of this court, at his office, in the city of Detroit, on or before the day on which this writ of subpœna is returnable, otherwise the bill of complaint in this cause will be taken *pro confesso* against said defendant-.

WALTER S. HARSHA, *Clerk.*

EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that on the 25th day of February, A. D. 1885, I served the within writ on The Township of Clarendon, in said district, defendant within named, near Clarendon Station, in said district, by delivering to S. A. Flint, personally, a true copy thereof, also exhibiting this writ, with the seal of the court impressed thereon; said A. S. Flint being the supervisor of said township and a resident of said district; said copy having like memorandum appended thereto as is hereto appended.

S. S. MATTHEWS,
U. S. Marshal.

Fees:

Service	$2 00
104 — travel	6 24
Copy	50
Total	$8 74

Endorsed: No. 2941. Circuit court of the United States for the sixth circuit and eastern district of Michigan. In chancery. Joseph E. Young, compl't, *vs.* The Township of Clarendon and The Mich. Air Line Railroad Company, def'ts. Subpœna. Filed Feb'y 26, A. D. 1885. Walter S. Harsha, clerk.

17 *Entry of Appearance of Defendant Township.*

In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG, Complainant,
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD COMPANY, Defendants.

MARCH 27, 1885.

On filing a præcipe signed by Gibson & Parkinson, and on motion of Isaac Marston and Gibson & Parkinson, solicitors for The Township of Clarendon, one of said defendants, it is ordered that the appearance of said defendant, The Township of Clarendon, be, and the same is hereby, entered herein; and on like motion it is further ordered that the complainant herein be, and he is hereby, required to deliver to the said defendant or to its said solicitors a copy of the bill of complaint on file in this cause within twenty days after service upon him of a notice of the entry of this order.

WALTER S. HARSHA, *Clerk*,
By JNO. GRAVES, *Dep'y.*

18 *Demurrer of Defendant, Township of Clarendon.*

The Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG, Complainant,
vs.
THE TOWNSHIP OF CLARENDON *et al.*, Defendants.

The demurrer of the said defendant, The Township of Carendon, to the bill of complaint of Joseph E. Young against the said defendant *et al.*

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint to be true in such manner and form as the same are therein set forth and alleged, demurs to said bill, and for cause of demurrer shows—

1st. It does not appear that the Grand Trunk Railway of Michigan and the Grand Trunk Railway Company of Northern Indiana, the said last-named company being a foreign corporation, had any authority to consolidate and form a new company; that the Legislature of the State of Michigan could not authorize the consolidation of such corporations.

2nd. It does not appear that said companies in attempting to consolidate and form a new corporation under the statutes of the State of Michigan complied therewith, in this, it is not alleged that the directors of said corporations entered into any agreement for consolidation as required by the statutes of the State of Michigan. It is not alleged that meeting- of the stockholders of said corporations were called and notice thereof given to sanction any agreement made by such directors for consolidation, or that such meetings were held and any agreement sanctioned, or that such contract of consolidation was filed with the secretary of state of said State of Michigan, as required by the statutes thereof.

3rd. It does not appear that the so-called Michigan Air Line Railroad Company and the St. Joseph Valley Railroad Company were consolidated for the reasons pointed out in the preceding paragraph, numbered two.

4th. If such consolidations were had and a new corporation formed thereunder in October, 1870, it does not appear that said complainant had any claim or demand against such corporation, or that he commenced any action or recovered any judgment or issued any execution thereon against such corporation.

5th. It does appear by the bill if such corporation was legally organized in 1870 that at the time the execution mentioned in the bill of complaint was issued, and while the same was held by the said marshal for collection, and when return thereon was made, that said corporation was solvent and had ample and sufficient property liable to seizure upon said execution to fully satisfy the same.

6th. It does not appear that notice was given the electors of said

township stating or setting forth the particulars or terms
19 upon which it was proposed to vote aid, as required by the statutes of the State of Michigan under which such alleged aid was voted.

7th. It appears that the aid so voted was by a loan of the bonds of said township, to be repaid by the corporation receiving such loan, and such corporation could not enforce delivery of such bonds for such purpose or collect from said township the amount thereof as a debt due and owing said railroad corporation.

8th. It appears said bonds were executed by said township and deposited with the State treasurer, and that the same were afterwards surrendered up by said treasurer. The liability of said township thereon, if at all, would be in a court of law and not by proceedings in chancery, and the said bonds would not, nor would the facts stated in said bill, constitute or create any equitable claim in favor of said complainant against said township for or upon said bonds or for the amount proposed to be loaned thereby.

9th. It appears that said bonds or some of them became due and payable more than ten years before the commencement of this action by said complainant, and that all remedy thereon is barred by the statute of limitations.

10th. It does not appear that said railroad company or said complainant or any other person has made any claim or demand for said bonds or claim by reason thereof since February, 1871, until the filing of the bill of complaint in this case, and that, more than ten years having elapsed since any claim or demand was made, the said township is released from any liability that may have existed thereon.

11th. It appears that at the time of the alleged formation of the said Michigan Air Line Railroad Company, defendant, it had full knowledge that the said bonds were executed and deposited with the State treasurer, contrary to and in violation of the constitution of the State of Michigan, and that the said bonds were absolutely void, and that no liability was created or incurred by said township thereon.

12th. That said bonds were voted, signed, and deposited with the State treasurer in violation of the constitution of the State of Michigan and were absolutely void and of no value.

13th. That said bonds were surrendered up by said State treasurer for cancellation by and in accordance with the decisions of the supreme court of the State of Michigan, and that they thereupon possessed no value and had no validity.

14th. That if said bonds did create any liability against said township and in favor of said railroad company the said railroad company and all others claiming through or under it have by their laches and delay in making claim thereto or attempting to enforce such liability acquiesced in the surrender and cancellation thereof and have thereby, both at law and in equity, lost all claim thereon and remedy thereto.

20 15th. That the said complainant has not in and by said bill made or stated such a case as doth or ought to entitle him to

any discovery or relief as is thereby sought or prayed for from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court whether it shall be compelled to make any further or other answer to the said bill or any of the matters or things therein contained, and prays to be hence dismissed with its reasonable costs in this behalf sustained.

GIBSON AND PARKINSON,
Solicitor for Defendant, Township of Clarendon.
ISAAC MARSTON, *Of Counsel.*

I certify that, in my opinion, the foregoing demurrer of said defendant township to the bill of complaint of Joseph E. Young, complainant, is well founded in law and proper to be filed in said cause.

JOHN ATKINSON,
Sol'r in Chancery.

Endorsed: 2941. U. S. circuit court, east. dist. of Mich. In equity. Joseph E. Young, co'pl't, *vs.* Township of Clarendon *et al.*, def'ts. Demurrer. Filed May 9, 1885. Walter S. Harsha, clerk.

21 *Stipulation Waiving Affidavit.*

The Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG *vs.* TOWNSHIP OF HOMER *et al.*

JOSEPH E. YOUNG *vs.* TOWNSHIP OF CLARENDON *et al.*

JOSEPH E. YOUNG *vs.* TOWNSHIP OF CONCORD *et al.*

JOSEPH E. YOUNG *vs.* TOWNSHIP OF TEKONSHA *et al.*

In above-entitled causes it is hereby stipulated and agreed by and between the parties thereto that the affidavit required by general equity rule 31 to be attached to demurrers be waived, as regards the demurrers filed in said causes by the defendant townships.

Dated May 9th, 1885.

ALFRED LUCKING,
Compl't's Sol'r.
GIBSON & PARKINSON,
Sol'rs for Def't Townships.
ISAAC MARSTON, *Of Counsel.*

Endorsed: U. S. circuit court, east. dist. of Michigan. In equity. Joseph E. Young *vs.* Township of Homer, and Same *vs.* Townships of Clarendon, Concord, & Tekonsha. Stipulation waiving affidavit. Filed May 9, 1885. Walter S. Harsha, clerk.

22 *Complainant's Notice of Hearing.*

The United States Circuit Court, Eastern District of Michigan. June Term, 1885. In Equity.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD CO.

Notice that this cause will be brought on for hearing on demurrer at the next term of this court.
Dated May 15th, 1885.

ALFRED LUCKING,
Sol'r for Compl't.

To Isaac Marston & Gibson & Parkinson, sol'rs for Township — Clarendon.

To the clerk:
Please place above cause on calendar for next term.

ALFRED LUCKING,
Sol'r for Compl't.

Filed May 18th, 1885.

WALTER S. HARSHA, *Clerk.*

23 *Defendants' Notice of Hearing.*

The Circuit Court of the United States for the Eastern District of Michigan. June Term, 1885. In Equity.

JOSEPH E. YOUNG, Compl't,
vs.
TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD, Def'ts.

Please take notice that this cause will be brought on for hearing on demurrer at the next term of this court.
Dated May 18, 1885.

ISAAC MARSTON,
Solicitor for Township.

To Alfred Lucking, solicitor for compl't.

To the clerk:
Please place the above cause on the calendar for next term.

ISAAC MARSTON,
Solicitor for Township.

Filed May 19, 1885.

JNO. GRAVES,
Dep. Clerk.

24 *Demurrer Argued in Part.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Tuesday, the fifteenth day of September, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON *et al.* } In Equity.

In this cause a demurrer by defendant to complainant's bill is argued in part.

Demurrer Submitted.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the sixteenth day of September, in the year one thousand eight hundred and eighty-five.

Present: The Honorable Henry B. Brown, district judge.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON *et al.* } In Equity.

In this cause the court hears the conclusion of the arguments of counsel upon the demurrer to complainant's bill, and thereupon said matter is submitted.

25 *Proof of Service of Subpœna on Mich. Air Line R. R. Co.*

Circuit Court of the United States of America for the Sixth Circuit and Eastern District of Michigan, Sitting in Chancery.

The President of the United States of America to the Township of Clarendon, Calhoun county, and the Michigan Air Line Railroad Company, both of whom are citizens of Michigan and residents of said district:

You are hereby commanded to be and appear in the circuit court of the United States of America for the sixth circuit and eastern district of Michigan, sitting in chancery, before the judges thereof, at the district court room, in the city of Detroit, on the first Monday of April next ensuing, then and there to answer unto a bill of complaint exhibited against you as defendant by Joseph E. Young, a citizen and resident of Illinois, as complainant; and this you shall in nowise omit under the penalty of one thousand dollars.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24th day of February, in the year of

our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and ninth.

[SEAL SUBPŒNA.] WALTER S. HARSHA, *Clerk.*

MEMORANDUM.—The above-named defendants are required to enter their appearance in this suit with the clerk of this court at his office, in the city of Detroit, on or before the day on which this writ of subpœna is returnable, otherwise the bill of complaint in this cause will be taken *pro confesso* against said defendants.

WALTER S. HARSHA, *Clerk.*

Personal service of the subpœna of which the within is a copy is hereby admitted to have been made on the Michigan Air Line Railroad Co., the within-named def't, by service on me as president of the said company this 25th day of February, 1885.

J. B. EATON, *President.*

26 STATE OF MICHIGAN, } ss:
Jackson County, }

John M. Root, being duly sworn, says he is 61 years of age and a resident of said county; that he knows well the signature of Jerome B. Eaton, who is president of the Michigan Air Line Railroad Co., within-named defendant, and that the above signature to confession of service of subpœna is his true and genuine signature; and further says not.

J. M. ROOT.

Subscribed and sworn to before me this 16th day of February, 1886.

W. C. LEWIS,
Notary Public, Jackson Co., Mich.

Endorsed: No. 2941. Circuit court of the United States for the sixth circuit and eastern district of Michigan. In chancery. Joseph E. Young, com-l't, *vs.* The Township of Clarendon *et al.* Subpœna returned and filed Feb'y 17th, A. D. 1886. Jno. Graves, dep. clerk.

27 *Order pro Confesso as to Michigan Air Line R. R. Co.*

In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG, Complainant,
vs.
THE TOWNSHIP OF CLARENDON, CALHOUN CO., and THE MICHIGAN AIR LINE RAILROAD COMPANY, Defendants.

On filing due proof of personal service of the subpœna issued in this cause on the defendant, The Michigan Air Line Railroad Company, therein on or before the return day thereof, and more than twenty days having elapsed since said return day, and said defendant, The Michigan Air Line Railroad Company, not having ap-

peared in said cause, on motion of Alfred Lucking, solicitor for the complainant, it is ordered that the bill of complaint filed in this cause be, and the same hereby is, taken as confessed by the said defendant, The Michigan Air Line Railroad Company.

ALFRED LUCKING,
Solicitor for Complainant.

Endorsed: No. 2941. The circuit court of the United States for the eastern district Michigan. In equity. Jos. E. Young *vs.* The Township of Clarendon *et al.* Order *pro confesso* received. Filed and entered in Book of Common Orders No. —, at page —, this 17th day of February, A. D. 1886. Jno. Graves, dep'y clerk.

28 *Stipulation to Amend Bill.*

The Circuit Court *for* the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD COMPANY, Defendants.

In this cause agreed that the complainant may write into the original bill of complaint amendments as follows:

1st. A clause showing the actual return of the marshal to the writ of execution mentioned in the 3- and 4th paragraphs of said bill.

2nd. An allegation of non-collusion with the debtor, as required by circuit-court rule in cases of creditor's bill.

ISAAC MARSTON,
Of Counsel for Def'ts.

To the clerk of said court:

You may allow complainant's solicitor to write in similar amendments in the original bills filed in the Tekonsha, Homer, and Concord cases.

ISAAC MARSTON,
Of Counsel for Def'ts.

Endorsed: 2941. U. S. circuit —, E. D. of Mich. In equity. Young *vs.* Clarendon. Stipulation. Filed March 1, 1886. Walter S. Harsha, clerk.

29 Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON, Impleaded with the MICHIGAN AIR LINE RAILROAD CO.

FEB. 15, 1886.

Where a municipality contracts with and issues its bonds to a

railroad company formed by the consolidation of two other companies it is estopped to question the validity of the consolidation.

A township, having voted to aid the construction of a certain railroad, issued its bonds for that purpose and deposited them in escrow with the State treasurer to await the certificate of the Governor of the completion of the road. While the road was in progress the law under which the bonds were issued was declared to be unconstitutional, and the bonds were returned by the State treasurer to the township. The company went on and completed the road. Subsequently the bonds were declared by the Supreme Court of the United States to have been rightfully issued, and a judgment creditor of the road filed his bill to obtain the benefit of them. Held, that the surrender of the bonds by the State treasurer and their retention by the township was a conversion which entitled the company to bring immediate suit, and that the bill, not having been filed until thirteen years after the bonds were surrendered, must be dismissed.

On Demurrer to Bill in Equity.

This was a bill filed in 1885 by a judgment creditor of the Michigan Air Line Railroad Co. to realize for his own benefit the amount of certain bonds issued by the defendant township under the railroad aid law of this State, which had been deposited with the State treasurer and were held by him for the benefit of the road until the law was declared unconstitutional, and were then returned to the township authorities. The bill set up a judgment of this court in favor of the plaintiff against the railroad company for $355,865.24 for the construction of a portion of the road, the issue and return of an execution unsatisfied, and the non-payment of the judgment. The bill further averred the defendant railroad to be a corporation organized on the 28th of August, 1868, by a consolidation of two companies—one organized under the law of Michigan and the other under that of Indiana; that on the 8th of October, 1870, this consolidated road was again consolidated with the St. Joseph Valley Railroad Company, still, however, retaining its name of the Michigan Air Line Railroad; that on the 21st day of June, 1869, the electors of the defendant township voted to pledge the aid of the township to the company by a loan of its bonds in the sum of $10,000 upon certain terms and conditions, provided the road should be constructed through such township, and would pay a certain proportion of its dividends in extinguishment of the interest upon the bonds and a certain other proportion to apply upon the principal. Bonds were subsequently issued, and in July, 1869, were delivered to the State treasurer to await the certificate of the Governor of the completion of the road, as required and authorized in such cases. The agreement required by the resolution of the township was executed by the railroad company. The road was in process of construction when, on May 26th, 1870, the supreme court of the State declared the law under which the bonds were issued to be unconstitutional. Notwithstanding this decision, the company went on and completed the road in full compliance with the conditions

of the pledge, and applied to the Governor of the State for his certificate that it had complied with the provisions of the act and was entitled to the bonds. The Governor declined to issue his certificate, giving as his sole reason for refusing that the law had been declared unconstitutional. The bill further averred that in May, 1872, the township, without the knowledge of the railroad and in fraud of its rights, induced the treasurer to surrender to it the bonds and coupons which the township has since retained; that the railroad company has never made or paid any dividends; that the bonds became in justice and equity the property of the company, and the township became bound upon the same according to their tenor and effect, and that the plaintiff is entitled to the amount of such bonds and coupons, with interest thereon, to be applied in payment of his judgment against the railroad company.

To this bill the defendant township demurred upon the grounds set forth and discussed in the opinion.

Messrs. Conely & Lucking, for the plaintiff; Messrs. Boudeman, Marston & Gibson, for the defendant.

BROWN, *J.*:

The first and second grounds of the demurrer, which may be considered together, are based upon the theory that there is no sufficient averment of a consolidation of the two grand trunk railways of Michigan and Northern Indiana. It is not alleged that the Legislature of Indiana ever authorized the consolidation, nor that the directors of the two companies entered into an agreement to consolidate, nor that a stockholders' meeting was called to sanction such an agreement, nor that such an agreement was filed with the secretary of state, as required by law. Doubtless the Legislature of this State could not alone authorize this consolidation. A legal consolidation of two roads in different States can only be had by the concurring act of the proper authorities of both; so, too, if the plaintiff derived his right to file this bill by virtue of the consolidation, it would perhaps be necessary to set forth in detail the successive steps to a legal consolidation.

Peninsular R. R. Co. *vs.* Tharp, 28 Mich., 505.
Rogers *vs.* Wells, 44 Mich., 411.

But the bill avers this consolidation to have been effected on the 28th of August, 1868; the resolution to aid the company in the construction of its road to have been adopted in June, 1869, and the bonds to have been issued in Jan., 1870. In other words, the township contracted and dealt with the consolidated company,
31 and is therefore estopped to question the validity of its organization.

Field on Corporations, sec. 385.

Putting aside all the other technical objections to the bill, any of which, if valid, may be readily surmounted by an amendment, we proceed to the consideration of the merits of the case. The ques-

tions presented, though involving directly or indirectly some millions of dollars, require no elaborate discussion. The object of the bill is to obtain the benefit of certain bonds issued by the defendant township in aid of the Michigan Air Line R. R. Co. and deposited with the State treasurer to await the certificate of the Governor of the completion of the road. Before the road was built the law under which the bonds were issued was decided to be unconstitutional (People *vs.* Salem, 20 Mich., 452), and the bonds were returned to the township and cancelled. Nevertheless the company proceeded to complete the road and earned the right to the bonds upon the theory adopted by the Supreme Court of the United States that the law was constitutional.

Township of Pine Grove *vs.* Talcott, 19 Wall., 666.
Taylor *vs.* Ypsilanti, 105 U. S., 60.

Had this court been one of general jurisdiction, with power to issue original writs of mandamus, we are inclined to think that such a writ might have been awarded upon the application of the present plaintiff if made before the bonds were surrendered by the State treasurer. It is possible, too, that a bill for a mandatory injunction might have been sustained in this court for the same purpose, but, the bonds having been returned to the township and fourteen years having passed since the completion of the road and the right to the bonds had accrued, it is manifestly too late to institute any proceedings upon the theory that the plaintiff is entitled to the bonds themselves or to their value at the time they should have been delivered to the company. In this connection we take it for granted that the plaintiff stands in no better condition to enforce the obligation of the township, except by reason of his non-resident citizenship, than the company would have had had proceedings been instituted in its name.

Recognizing the insuperable difficulty of maintaining a bill in this aspect, plaintiff seeks by the present bill to treat the bonds as if they had been actually delivered to the company, and to sue upon them as lost or destroyed instruments. In the 25th paragraph of his bill he prays that the court will adjudge and declare that the company earned these bonds and was entitled thereto, and that the township is equitably indebted to the company in the whole amount of the bonds and coupons, with interest thereon; that the court will ascertain the amount equitably due from the town and decree that it pay such amount to the plaintiff toward the satisfaction of his judgment. The defendant takes the position that there was never any contract between the township and the railroad company; that the act of the township in voting to make the loan was its separate and independent act, and the building of the railroad a separate and independent act of the company; that there was no consideration or mutual promise that in any way obligated the township to make the loan, and that the only mode by which such contract could be created was by the actual delivery of the bonds to the company. We cannot assent to this
32 proposition. We think that the pledge voted by the township, the agreement executed by the railroad company in

compliance with the second condition of this pledge, as set forth in paragraph 17 of the bill, and the delivery of the bonds to the State treasurer amounted to the consummation of a contract between the township and the company, and that the construction of the road entitled the company to the bonds. We think we are justified in holding this to be a contract by the language of the opinion in Taylor *vs.* Ypsilanti, 105 U. S. 60, 72, and New Buffalo *vs.* Iron Co., *Ibid.*, 73. The cases cited by the defendant are not controlling in this particular. In the case of The Aspinwall *vs.* The Commissioners of the County of Daviess, 22 How., 364, stock was subscribed and bonds issued by the county commissioners in compliance with a vote of the county held on the 1st of March, 1849; but before the subscription was actually made the State adopted a new constitution, which went into effect November 1st, 1851, one of the articles of which prohibited such subscription. In 1852 the county commissioners subscribed for stock and issued its bonds, and it was held that a mere vote to subscribe did not of itself form such a contract as would be protected by the Constitution of the United States, and that until the subscription was actually made the contract was unexecuted. It is readily distinguished from the present case in the fact that these bonds were actually issued and placed in escrow in the hands of the State treasurer to await the completion of the road, and that the company went on and built the road upon the faith of the bonds. The township had done the last thing it was required to do by its pledge. Practically the same position was taken by the supreme court of Illinois in the case of People *vs.* The County of Tazewell, 22 Ill., 147, in which it was held that until the county or city had subscribed there was no privity between the road and county or city. "It is the contract of subscription which compels the subscriber for stock to pay his money and the company to issue to him shares of their stock. Until the county subscribes for shares of their stock the company held no obligation upon the county and cannot, by tendering shares of stock, compel them to subscribe or issue bonds; nor have they any power to compel the road to issue to them shares of their stock. Until the subscription is made it is entirely at the option of the road whether they will permit such subscription. Before the subscription is made no obligation exists between the parties, nor can the vote be treated as an agreement between the county and the road beyond what the law has peremptorily required to be performed. When the vote was taken and resulted in favor of the subscription it only amounted to a delegation of power to the supervisors to make the contract of subscription as the law then authorized them to do." It is too clear for argument that this language has no application to the case under consideration. In the case of Faulconer *vs.* The Buffalo & C. R. R. Co., 7 Hun., 499, it was held, in the same terms, that the consent of a majority of the tax-payers of a town that the bonds of the town might be issued in aid of the construction of a railroad gave no right to the company that a court of law or equity would enforce against the town, because the company was not bound to receive the bonds; it
33 could not compel the persons appointed to issue the bonds,

because they owed no duty at that stage of the case to the company. Here, too, the transaction was wholly incomplete on the part of the town. The present case would have been similar if the township had stopped with the bare pledge and never issued the bonds. In The Town of Concord *vs.* The Portsmouth Savings Bank, 92 U. S., 695, the bonds were voted in November, 1869, provided the company would run its road through the town. On the 20th of June, 1870, the company gave notice of its acceptance of the donation, and on July 2nd, 1870, a new constitution was adopted annulling the power of any municipality to make donations or loan its credit to railroad companies. Notwithstanding this, in October, 1871, the bonds were issued by the supervisor and town clerk. It was held that as the town had no authority to make a contract to give, and the acceptance of the company was an undertaking to do nothing which it was not bound to do, no valid contract arose from such offer and acceptance. The opinion was placed upon the ground that the donation was not permitted to be made until after the completion of the location and construction of the road through the town, that the popular vote was not itself a donation, and that the town was not authorized to make it until the road was located and constructed. Before that time and before any attempt at a donation or appropriation was made the authority was withdrawn. The town had authority to make a donation, but it had no authority to make a contract to give, and as the donation was made after the constitution took effect it was very naturally held to be void. Here the act expressly authorizes the bonds to be issued before the road was completed, and this act, as we are bound to hold, was never repealed or annulled to the disturbance of vested rights.

It is true there was no delivery of these bonds to the company, but they were executed and delivered in escrow to the State treasurer, and, upon the performance of the condition upon which they were deposited, the title to them vested in the company, notwithstanding they were not actually delivered.

Couch *vs.* Meeker, 2 Ct., 302.
Taylor *vs.* Thomas, 13 Ks., 217.
Jackson *vs.* Catlin, 2 Johns., 248.
1 Washburn on Real Property.

The Governor's certificate was merely a formal act, the proper evidence upon which the State treasurer was empowered to deliver the bonds to the company, but in no sense a condition precedent to the company's rights to them, when withheld for any other reason than the failure to complete the road. Had this bill been promptly filed we see no escape from the conclusion that the plaintiff would have been entitled to a decree for the value of the bonds, but in the view we have taken of the case the surrender of the bonds by the State treasurer and their receipt by the township was a conversion and entitled the plaintiff to bring immediate suit for their value.

Knight *vs.* Legh, 4 Bing., 589.
Outhouse *vs.* Outhouse, 13 Hun., 130.

Having the right to sue he was bound to exercise such right within the time allowed by law for that purpose. He might also waive the tort and bring assumpsit for their value, but where, as in this case, the right of action attaches immediately we do not think he can wait until the maturity of the bonds and sue upon them. In neither of the two cases above cited from Connecticut and Kansas, where the right to sue upon the instruments was sustained, did the question of conversion arise. In Couch *vs.* Meeker, 2 Ct., 302, the note was put, as an escrow, into the hands of a third person, subject to the performance of a certain condition. Plaintiff brought suit upon the note and averred that the condition had been performed, and the depositary brought the note into court, and plaintiff was held entitled to recover. In Taylor *vs.* Thomas, 13 Ks., 317, it does not appear in whose hands the note was at the time the suit was begun, but there was no evidence of conversion. It is true that the case of Lamb *vs.* Clark, 5 Pick., 193, is an apparent authority for the proposition that an action of assumpsit may be maintained notwithstanding the time for bringing an action of trover may be barred by the statute. In this case the defendant fraudulently procured of the plaintiff's intestate a quantity of notes and securities. The transaction took place more than six years before the commencement of suit. It appeared that the notes were paid to the defendant by the makers thereof at various times, some more and some less than six years before the suit was begun. The defendant contended that if there was fraud in the transaction it was barred by the statute of limitations, but the court held that, notwithstanding the notes were obtained by fraud, the plaintiff might recover all such moneys as were received by the defendant from the makers of the notes within six years before the commencement of the action, holding substantially that the defendant could not take advantage of his own fraud by pleading the statute of limitations. "There are cases," says the court, "where the injured party may have his election of remedies, as, where there has been a tortious taking of his property, he may bring trespass or trover or he may waive both and bring assumpsit for the proceeds when it shall have been converted into money; and, if he chooses the latter mode of redress, the *tort feasor* cannot, we think, allege his own wrong for the purpose of carrying back the injury to a time which will let in the statute of limitations;" but the rule enforced in this case—that no one shall take advantage of his own wrong—has no just application to a technical wrong of the kind set forth in this bill. Under the law as construed by the supreme court of this State, the secretary of state could do no otherwise than return the bonds to the township. Probably he might have been compelled to do so by mandamus, and the township officers were guilty of no actual fraud or wrong in failing to recognize them until compelled to do so. To say that, under such circumstances, they cannot plead that the statute of limitations has run against the tort would be a manifest perversion of the maxim.

The position of the plaintiff in this suit assumes that the company was bound to wait until the maturity of the bonds before suit could be brought upon them, but we cannot assent to this prop-

osition. The bonds were issued to aid the construction of the road. It is safe to assume that the company did not desire them as an investment, but to raise money, by their negotiation and sale, for the payment of their current expenses. For this purpose they would be entirely useless, unless the company could obtain possession of them. To this possession it was entitled, and the withholding of it was a conversion, and from this time, if the statute of limitations did not begin to run at law, the duty of a party seeking equitable relief to act promptly attached. This view is not only the more just and equitable as respects the plaintiff, but the proposition for which he now contends would operate with extreme hardship upon the defendant township. These bonds, amounting in all to $10,000, were made to mature in sums of $1,000 each year from 1871 to 1880, with ten per cent. interest. This amount distributed, as was contemplated, over a period of ten years, might be easily raised by taxation, while a decree for the entire amount, rendered six years after the longest bond had matured, would fall with crushing weight upon the township and upon individuals who had purchased or dealt with property there upon the theory that the bonds were no longer valid obligations. As no interest had ever been paid upon these bonds, there was nothing to apprise the town that they would ever be enforced until this bill was filed. Upon the whole, we think the delay in this case is fatal.

A decree will be entered dismissing the bill with costs.

36 *Decree Dismissing Bill.*

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the third day of March, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE R. R. CO. } In Equity.

This cause came on to be further heard at this term upon the demurrer of the defendant, The Township of Clarendon, to the complainant's bill of complaint, and was argued by counsel; and thereupon, on consideration thereof, it is ordered, adjudged, and decreed as follows:

That the demurrer of the said defendant, The Township of Clarendon, be, and the same is hereby, sustained and the bill of complaint dismissed as to said defendant, with costs to be taxed, and that said defendant have execution therefor.

Order Allowing Claim of Appeal.

At a session of the circuit court of the United States for the eastern district of Michigan continued and held, pursuant to adjournment, at the district court room, in the city of Detroit, on Wednesday, the third day of March, in the year one thousand eight hundred and eighty-six.

Present: The Honorable Henry B. Brown, district judge.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE R. R. CO. } In Equity.

Now comes the complainant in this cause, by Alfred Lucking, his solicitor, and claims an appeal to the Supreme Court of the United States from the decree heretofore entered herein dismissing his bill of complaint as against the defendant, The Township of Clarendon; which claim of appeal is by the court now here allowed, and the bond on appeal is hereby fixed at five hundred dollars.

37 *Bond on Appeal.*

In the Circuit Court of the United States for the Eastern District of Michigan. In Equity.

JOSEPH E. YOUNG, Complainant,
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD COMPANY, Defendants.

Know all men by these presents that we, Joseph E. Young, as principal, and H. O. Bedell, as surety, are held and firmly bound unto the defendants in the sum of five hundred dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs and representatives.

Sealed with our seals this 8th day of March, A. D. 1886.

Whereas an order was made in the above-entitled cause on the third day of March, 1886, allowing an appeal by the said complainant from the decree made in said cause on the same day, by which the bill of complaint in said cause was dismissed, which appeal was allowed on condition of filing a bond in the penal sum of $500.00, in the usual form:

Now, the condition of this obligation is that if the said complainant shall prosecute his said appeal with all due speed and shall pay all such costs as may upon the affirmance of said decree be adjudged or decreed to said defendants or either of them, then this bond to be void; otherwise of full force.

JOSEPH E. YOUNG, [L. S.]
By ALFRED LUCKING,
His Attorney-in-Fact.
H. O. BEDELL. [L. S.]

STATE OF MICHIGAN, } ss:
County of Jackson, }

H. O. Bedell, of said county, being duly sworn, deposes and says that he is the same person who signed the foregoing bond as surety, and that he is worth, in property subject to execution in the eastern district of Michigan, over and above all encumbrances and exemptions & debts, the sum of $500.00; and further says not.

H. O. BEDELL.

Subscribed and sworn to before me this 8th day of March, 1886.

R. T. McNAUGHTON,
Notary Public in & for Jackson Co., Mich.

The foregoing bond is satisfactory to us.

ISAAC MARSTON,
Sol'r for Def't.

Approved:
H. B. BROWN.

Endorsed: 2941. U. S. circuit —, E. D. of M. In equity. Jos. E. Young *vs.* Clarendon. Bond on appeal. Filed March 9, 1886. Walter S. Harsha, clerk. Alfred Lucking, for compl't.

38 *Clerk's Certificate.*

THE UNITED STATES OF AMERICA:

The Circuit Court of the United States for the Eastern District of Michigan.

JOSEPH E. YOUNG
vs.
THE TOWNSHIP OF CLARENDON and THE MICHIGAN AIR LINE RAILROAD COMPANY.

I, Walter S. Harsha, clerk of the circuit court of the United States for the eastern district of Michigan, do hereby certify and return to the claim of appeal to the Supreme Court of the United States of Joseph E. Young, the complainant in the above-entitled cause, that the above and foregoing is a true copy of the entire record and proceedings of said court in the above-entitled cause as the same appears of record in my office; that I have compared the same with the original, and it is a true and correct transcript therefrom and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, in said district, this second day of April, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States of America the one hundred and tenth.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA, *Clerk.*

Endorsed on cover: E. Michigan C. C. U. S. No. 288. Joseph E. Young, appellant, *vs.* The Township of Clarendon and The Michigan Air Line Railroad Company. Filed June 11, 1886.

Office Supreme Court U. S.
FILED.
APR 22 1889
JAMES H. MCKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 288.

JOSEPH E. YOUNG, APPELLANT,

vs.

THE TOWNSHIP OF CLARENDON AND THE MICHIGAN AIR LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

JOHN D. CONELY,
Counsel for Complainant.

ALFRED LUCKING,
Solicitor for Complainant.

FILED JUNE 11, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

JOSEPH E. YOUNG,
Appellant,
vs.
THE TOWNSHIP OF CLARENDON and the MICHIGAN AIR LINE RAILROAD COMPANY.

No. 288.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan by the ~~Township~~ Complainant.

STATEMENT.

This case is in equity. The bill was taken as confessed by the railroad company, but demurred to by the township. At the hearing it was dismissed with costs.

The bill begins on page 1 of printed Record; the causes of demurrer on page 17.

The facts stated in the bill to which it is necessary to direct the attention of the court are as follows:

On November 11, 1884, complainant obtained judgment against one of the defendants (the Railroad Company) for the sum of $335,865.24, and interest at eight per cent. per annum.

This judgment was on certain coupons for installments of interest on money bonds that had been issued by the Railroad Company in January, 1870. Execution was duly issued and returned unsatisfied. The form of the return showing diligent search during the whole of the lifetime of the execution, and want of property in Railroad Company, is set out on page 2 of printed Record.

The judgment is still wholly unpaid, and it is sought by this bill to subject to its payment certain equitable indebtedness of the other defendant (the Township), arising out of the following circumstances, which are stated in the bill:

Prior to August 28th, 1868, there had been in existence two railroad companies; one the Grand Trunk Railway Company of Michigan and the other the Grand Trunk Railway Company of Northern Indiana. Both were duly organized, but neither had constructed any portion of its road. On that day a corporation then and afterwards known as the Michigan Air Line Railroad Company became a duly organized railroad company under the laws of Michigan by the consolidation of the two Grand Trunk companies above named.

The company formed by this consolidation undertook the work of constructing a railroad, and continued so to do down to the 8th day of October, 1870. On this last named day a consolidation was had by the Michigan Air Line Company and by the St. Joseph Valley Company.

The consolidated company retained the name of "Michigan Air Line Company," which, as we have seen, was the name of one of its constituent parts.

(As some confusion may result from an omission to keep this

in mind, special attention is called to it, and to the statement in the bill, that all allegations concerning the Michigan Air Line Railroad Company that relate to transactions occurring before October 8th, 1870, refer to the first Michigan Air Line Railway; and all allegations concerning the Michigan Air Line Railway Company that relate to transactions occurring after October 8th, 1870, refer to the second and present Michigan Air Line Railway Company.)

The last consolidated company proceeded with the work begun by its predecessor, and completed the building of the road. The complainant in this case was the contractor, and performed the work, taking in payment therefor the bonds hereinbefore mentioned; and it is for these bonds that his judgment was obtained. Unless he can recover in this suit he will be without compensation.

As has been before noticed, the first consolidation, that of the two Grand Trunk companies, was effected on the 28th day of August, 1868. At this time it was contemplated and generally understood that the Michigan railroad act passed at the session of 1869 would be introduced and become a law.

The promoters of the consolidation and the stockholders then intended to build the road *only* in the event that said act should become a law, and the township grant such an amount of aid as would warrant the undertaking; and the people of the Township of Clarendon well understood this.

It is a part of the local history, and it is alleged in the bill, that the people along the contemplated line did not possess such railroad facilities as their products and business interests rendered desirable, and the construction of the road was regarded as of special pecuniary benefit to the people of the particular townships and of great benefit to the whole public.

The railroad act took immediate effect on March 22d, 1869.

It is set out at length in the printed Record on page 10, and is also found in Michigan Session Laws for 1869, on page 89.

Under this act several townships and cities pledged their credit respectively as follows:

Lockport	$ 40,000
Concord	15,000
Homer	10,000
Tekonsha	15,000
Union	25,000
City of Jackson	50,000
Nottawa	25,000
Niles	20,000
Penn	15,000
Calvin	20,000
City of Niles	50,000
Newburgh	12,000
Colon	25,000
Clarendon, the defendant	10,000
Total	$332,000

The language of the vote of the defendant is as follows:

"The faith and credit of the Township of Clarendon, in the county of Calhoun, in the State of Michigan, is hereby pledged to aid the Michigan Air Line Railroad Company in the construction of its road by a loan of the sum of ten thousand dollars, upon the terms and conditions following:"

They are as follows:

1st. That the bonds of said township, payable at the time hereinafter specified, and bearing an annual interest of ten per cent., shall be received by the said railroad company at their par value, in payment of said loan.

2d. That the said company receiving the said bonds from the State treasurer in the manner provided by law shall pay yearly to the said township on the amount so loaned a sum equal, *pro rata*, to the dividends from year to year paid to the stockholders of the said company, such dividends being ten per cent. or less, the said payments to be deemed and received as and for the

annual interest on the amount loaned, and in case such dividend shall exceed ten per cent., then the amount of the excess over ten per cent. shall be applied to reduce the said principal sum until it shall be thereby fully paid, an agreement to which effect shall be executed by said railroad company.

3d. That the said railroad company shall remain located, and be constructed through the said Township of Clarendon.

4th. That the bonds to be issued by said township shall be of such denominations, not exceeding $1,000 and not less than $100 each, as the said railroad company shall request, that coupons shall be annexed for the annual interest, that such bonds and coupons shall be subscribed by the supervisor and clerk of said township, and that the same shall be drawn payable at the office of the treasurer of said County of Calhoun, and of the entire amount of the bonds one-tenth shall become payable on the first day of March, in the year 1871, and one-tenth on the first day of March in each of the nine succeeding years.

In case that the said railroad company shall not have completed its road-bed and ironed its road through the said Township of Clarendon in time to receive the said bonds by the first day of December, in the year 1869, or by the first day of October in any succeeding year, then the time of the payment of the bonds first growing due shall be postponed so that one-tenth of the principal sum shall become due on the first day of March in each year of the ten years which shall next succeed the time of the completion of said road-bed and the ironing of said road as aforesaid, and the additional coupons which may be necessary to provide for the payment of annual interest shall be attached to the bond, the payment of which may be postponed, the interest which shall accrue to the time when the first installment of the principal becomes due to be paid on the same day and annually thereafter.

Said aid is pledged under the provisions of and subject to all the restrictions of an act entitled "An act to enable any township, city or village to pledge its aid by loan or donation to any

railroad company now chartered or organized, or that may hereafter be organized under and by virtue of the laws of the State of Michigan, in the construction of its road, approved March 22, 1869."

Record, p. 4.

After the passage of the act, Clarendon (the defendant) issued its bonds for said amount of ten thousand dollars.

They were twenty in number, and each was for the sum of five hundred dollars with interest coupons attached, and all bore date July 20, 1869.

They matured due as follows:

1 and 2	March 1st, 1871
3 and 4	March 1st, 1872
5 and 6	March 1st, 1873
7 and 8	March 1st, 1874
9 and 10	March 1st, 1875
11 and 12	March 1st, 1876
13 and 14	March 1st, 1877
15 and 16	March 1st, 1878
17 and 18	March 1st, 1879
19 and 20	March 1st, 1880

The payment of the entire ten thousand dollars was thus distributed over the period of ten years, a thousand dollars and the interest as hereinafter mentioned maturing each year.

By the fourth condition of aid the time of payment of each was to be postponed a year in the event of the non-completion of the road-bed and the ironing of the road before December 1st, 1869. These things were all done before February 1st, 1871. But the time of payment of each bond and coupon was thereby postponed one year.

So that for the purposes of this suit, and in considering the question of the statute of limitations, each of the above named payments must be regarded as coming due a year later than above stated.

Record, p. 8, paragraph 17 of bill.

And thus they would be payable as follows:

1 and 2	1872
3 and 4	1873
5 and 6	1874
7 and 8	1875
9 and 10	1876
11 and 12	1877
13 and 14	1878
15 and 16	1879
17 and 18	1880
19 and 20	1881

The other townships and cities mentioned, made and executed similar bonds.

This suit directly involves the amount pledged by Clarendon only, although some of the other townships are interested in the decision of the question; the entire amount involved being something like three hundred thousand dollars.

After the issue of the bonds they were delivered to the State treasurer under the provisions of section 5 of the act.

Michigan Session Laws of 1869, p. 91.
Record, page 12, section 5.

Under the terms of the act and under the allegations of the bill the State treasurer became trustee for the township and trustee for the railroad company.

Record page 6, section 5.
Session Laws 1869, page 91.

The bonds were to be disposed of by the treasurer in discharge of his trust as in the act provided.

Session Laws 1869, page 91, sec. 5.
Record, page 6, sec. 5.

Section five is as follows:

"Whenever any such bonds as provided by the provisions of this act shall have been issued as therein specified, the same shall

be delivered by the person, persons or officers having charge of the same to the treasurer of this State, who shall give a receipt therefor, and hold the same as trustee for the municipality issuing the same, and for the railroad company for which they were issued, and to be disposed of by said treasurer in discharge of his trust as hereinafter provided."

So much of section 6 as shows how the bonds are to be disposed of is as follows: "Such bonds shall be safely kept by said treasurer, for the benefit of the parties interested, and be disposed of by him in the following manner: That is to say, whenever any railroad company, in aid of which any of such bonds may have been issued, shall present to said treasurer a certificate from the governor of this State that such railroad company has in all respects complied with the provisions of this act, and is thereby entitled to any of such bonds, the same, or such of said bonds as said company shall be entitled to receive, shall be delivered to said company, the treasurer first cutting therefrom, canceling and returning to the municipality, the past due coupons. The treasurer shall indorse upon each of said bonds the date of such delivery and to whom the same were delivered, and the same shall draw interest only from the time when so delivered."

The railroad company was informed of the action of the various townships and cities, and *in consideration of the aid so voted, and in reliance thereon and on the issue and delivery of the bonds* entered upon the construction of its road, including bridges, culverts, cattle-guards, stations and other buildings and apparatus. It began its work at the city of Jackson and other points on the line, and by the 26th day of May, 1870, had acquired the entire right of way between Jackson and Niles (107 miles). The larger part of the grading of the roadbed was completed between Jackson and Niles, the ties were purchased and were being delivered, and work was being pushed all along the line between those points. The company had also made contracts for the requisite rolling stock to equip and operate the road, *and had expended in construction upwards of a million of dollars.*

On the 26th day of May, 1870, came the decision in the Salem cause, holding the railroad aid act unconstitutional.

People vs. Salem, 20 Mich., 452.
Printed Record, page 7.

By this time the railroad company had made the expenditures and contracts hereinbefore mentioned, and could not discontinue its operations and abandon the construction of the road *without suffering thereby a pecuniary loss greater than the aggregate sum of aid voted to it*, and it therefore went forward and performed every condition precedent to the earning of the bonds and coupons, and had become fully entitled to have the same delivered by the State Treasurer, except that it had not received the Governor's certificate, mentioned in section 6 of the Railroad aid act.

Session Laws 1869, page 92.
Record, page 8.

Due proof that the company had earned the bonds and coupons was made to the Governor, and proper demand made of him for the certificate. The Governor admitted the sufficiency of the proof, but refused the certificate for the sole reason that he had been informed of the decision in the Salem case.

Record, page 9.

Thereafter, and on May 28, 1872, without the knowledge or consent of the railroad company, the township induced the State Treasurer, who knew all the hereinbefore mentioned facts, to surrender up and deliver the bonds and coupons in violation of his trust and in fraud of the company's rights, and they have ever since been retained and are now withheld by the township.

Record, page 9.

The company has never paid a dividend.

The townships have never paid any of the aid so voted, and by reason of the *omission so to do*, the railroad company has been unable to pay complainant.

Record, page 9.

There is the usual allegation of non-collusion.

Record, page 9.

The prayer of the bill is that the court decree as follows:

That the railroad company earned the bonds and coupons, and that it was entitled to them, and that the township is equitably indebted to the railroad company to the amount of them;

That the township obtained the bonds in fraud of the rights of the railroad company;

That the amount equitably owing be ascertained;

That the township be decreed to pay.

And for general relief.

The causes of demurrer are fifteen in number, and may be briefly stated as follows:

1st. That the first consolidation, that of the two Grand Trunk companies, was not authorized by law, one of them being a foreign corporation.

2d. That the steps to make such consolidation are not set out.

3d. That the steps to make the second consolidation are not set out.

4th. That the judgment is not against the defendant company.

5th. That the bill shows that the company was solvent and had sufficient leviable property to satisfy the execution.

6th. That the bill does not show that notice was given the electors, setting forth the terms upon which it was proposed to vote aid.

7th. That the aid voted was under the circumstances simply a loan of the bonds to the company, and being a loan their delivery could not have been enforced, nor could the amount of them have been collected.

8th. That the liability of the township, if at all, was exclusively at law and not in chancery; and that the facts stated create no equitable claim in favor of complainant and against the township, either for the bonds or for the amount of them.

9th. That some of the bonds became due more than ten years

before the filing of the bill, and that therefore all remedy is barred by the statute of limitations.

10th. That the bill does not disclose any demand for the bonds, made later than February, 1871, and that as more than ten years had since elapsed, the township is released from all liability.

11th. That it appears that at the time of the last consolidation, the railroad company had full knowledge of the unconstitutionality of the Railroad aid act.

12th. That the bonds were voted, signed and deposited with the State Treasurer, in violation of the Michigan constitution, and were therefore void.

13th. That the bonds were surrendered up by the State Treasurer for cancellation in accordance with the Michigan decision, and that they thereupon possessed no value.

14th. That the railroad company and the complainant are barred by delay.

15th. That complainant has not stated a case.

SPECIFICATION OF ERRORS.

There were fifteen causes of demurrer assigned. The defendant has the right to rely on all or any of such causes as a ground of dismissal, though the court below in its opinion placed its decision wholly on the proposition that complainant had lost his remedy by delay.

The appellant is unable to say how many of the causes of demurrer may now be urged; he therefore specifies that each of said causes of demurrer is erroneous.

ARGUMENT.

I.

In regard to the first cause of demurrer, namely, that the Grand Trunk Railway of Michigan could not consolidate with a company in another State, it may be said as follows:

The consolidation took place under the Michigan Act of 1855.

Session Laws of 1855, p. 153.

The section as to consolidation is section 50.

Laws of 1855, p. 174.

It is also found in the Compiled Laws of 1857, p. 653.

The portions of it on this subject are as follows:

"Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, into a single corporation."

Laws of 1855, p. 174.
Compiled Laws of 1857, p. 653.

"And such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of their respective charters or laws of organization, not inconsistent with the provisions of this act."

Laws of 1855, pages 174, 175.
Compiled Laws of 1857 on page 653, part of section 50.

Long before and at the time the aid was voted the act provided for consolidation with companies without the State.

The first consolidation was August 28, 1868.

Record, page 2.

The election by which the aid was voted was held June 21, 1869.

Record, page 2.

When the aid was voted, it was with the presumed knowledge, on the part of those who voted for it of the law authorizing consolidation. In *New Buffalo vs. Iron Company*, 105 U. S., 73, 105, a similar question, was raised under the same act of Michigan. In that case, as in this, after the vote came the consolidation. This court held the subscription passed to the new company by the consolidation.

New Buffalo vs. Iron Co , 105 U. S., 73.

The only distinction, so far as this point is concerned, is that in that case both of the constituent companies were Michigan companies. In this case, one of the companies is an Indiana company, and the point is made that the Legislature is powerless to make a law authorizing such a consolidation.

The point has been up in this court and was decided in

Nugent vs. Supervisor, 19 Wallace, 241.
Ohio & M. R. R. Co. vs. Wheeler, 1 Black 286–297.
Clark vs. Barnard, 108 U. S., 436.
Graham vs. Boston, &c., R. R., 118 U. S., 161.

II.

The 2d cause of demurrer is that all the steps to form the first consolidation are not set out in the bill. It is sufficient to say that the first consolidated company existed when the aid was voted, and that as the town dealt with that company and voted the aid to it, the legality of its consolidation cannot be attacked.

Toledo, etc., Co. vs. Johnson, 55 Mich., 456.

III.

The 3d cause of demurrer is that the successive steps to form the second consolidation are not alleged. The question is one of pleading only, and not of evidence, and is intended to test the sufficiency of the allegation regarding the second consolidation, which latter is found in the seventh paragraph of the bill.

Record, p. 2.

The averment is as follows :

"That said company undertook and continued said work of constructing said railroad, as hereinafter set out down to the eighth day of October, 1870, on which day a consolidation, under the statute of Michigan, in such cases provided, was formed by said Michigan Air Line Railroad Company, so formed on the 28th day of August, 1868, as hereinbefore set out, with the St. Joseph Valley Railroad Company, the two companies forming together a continuous line, which consolidated company continued under the name of the Michigan Air Line Railroad Company," and the said company proceeded with the work, etc.

Record, pp. 2 and 3.

The statute says that railroad companies, forming continuous lines, may consolidate. It may be doubted whether it was necessary to aver that they formed continuons lines. This is averred and admitted by the demurrer. The consolidation is averred. It is never necessary to set out the evidence of facts, but only facts themselves. The fact to be inquired into is simply, was there a consolidation? The fact of consolidation is alleged; more would be superfluous. This would be sufficient on the law side of the court, and less particularity is required in equity than at law.

Wilson vs. Eggleston, 27 Mich., 257-261.
Palmster vs. Lumber, 31 Mich., 183-4.
William vs. Hubbard, 1 Mich., 446-451.
Story's Eq. Pl., sec. 240.

It is not necessary now to consider what evidence is needed to show due consolidation. It is sufficient to say that the strictest proof of every step is not always required.

Swartout vs. M. A. L. R. R., 24 Mich., 380.

There is an allegation of consolidation and the building of the road by the consolidated company. This is clearly sufficient. It was so held in

D. L. & N. Co. vs. Starnes, 38 Mich., 698.

IV.

The 4th ground of demurrer is without foundation, as can readily be seen by reading the bill. The judgment, execution and bill of complaint are all against the consolidated company, formed in October, 1870—the defendant in this suit.

V.

The 5th ground is that the bill shows that at the time of the issuing of execution, and while the same was held by the marshal, the railroad company was solvent. The marshal's return is full on this point and absolutely conclusive against the position taken.

Jones vs. Green, 1 Wallace, 330-332.

VI.

The 6th ground of demurrer is that it does not appear that notice was given to the electors setting forth the particulars or terms upon which it was proposed to vote the aid.

The allegation is found on page 5.

They entirely refute this position.

VII.

The 7th ground of demurrer is that the aid voted was by a loan of the bonds of the township to be repaid by the corporation.

It is called a loan, but is not a loan in fact. The money was not to be paid back to the township except in the event that dividends were to be declared, and only such dividends were to be so paid.

Defendants' counsel relies on

Stanley vs. Nye, 51 Mich., 232.

In that case the plaintiff brought suit for two thousand dollars, which was to be loaned to him for two years. As more than two years had elapsed before suit was instituted, the court held it was idle to allow the recovery of money which, by the terms of the loan, was to be immediately repaid.

Stanley vs. Nye, 51 Mich., 232, 235.

The case of *New Buffalo vs. Iron Company*, 105 U. S., 73, disposes of this question, and holds that it would not be a material circumstance if it were a loan. This decision was made in relation to the statute now under consideration.

New Buffalo vs. Iron Co., 105 U. S., 73.

VIII.

The 8th, 11th and 15th causes of demurrer may be considered together.

Practically, they are that the law under which the bonds were voted, was unconstitutional and void, and that its unconstitutionality had been declared by the Supreme Court of the State before the time had arrived when the Railroad Company had

become entitled to a certificate from the governor that the bonds had been earned, and that the State Treasurer had returned the bonds to the township.

The contention of defendants' counsel in the court below was that no recovery can be had upon bonds of this character except by one to whom the bonds have passed from the original holder, and by one who has received them without knowledge of the Michigan decision.

In this case the bill shows that in all respects the company earned the bonds and were entitled to the certificate of the Governor, and that his only ground for refusing the certificate was that the Supreme Court of Michigan had held the law to be unconstitutional, and that the State Treasurer had been induced to return the bonds to the maker of them.

A court of equity will treat as having been done what ought to have been done. In this proceeding against the township, the township itself having the bonds in its possession, it cannot be heard to say that the Governor's certificate never was had, or that the bonds were never delivered.

Knight vs. Leigh, 4 Bing., 589.
Outhouse vs. Outhouse, 13 Hun., 130.

By the delivery to the Treasurer and by the performance of the conditions the title to the bonds vested in the company, the State Treasurer holding them as trustee for the township and for the railroad company.

Couch vs. Meeker, 2 Conn., 302.
Taylor vs. Thomas, 13 Kansas, 217.
Jackson vs. Catlin, 2 Johnson, 248.

The bill shows that the Michigan decision was announced on May 22, 1869.

People vs. Salem, 20 Mich. 452.

Previous to this time the Railroad Company had entered upon the work of construction, and by that day had practically acquired the entire right of way from Jackson to Niles; 107

miles, at which point the road connected with other through lines. The larger part of the grading of the road-bed was completed between these two points; the iron for the rails was contracted for, and was then being delivered; the ties were purchased and were being delivered, and work was being pushed all along the line between those points.

The company had made contracts for the requisite rolling stock to properly equip the road and operate its business thereon, and it had expended in construction more than a million of dollars.

Paragraph 14 of bill.
Record, page 7.

At the time of the decision the work had so far progressed that it could not stop. There was no choice for the company. The bill alleges that it could not stop without a loss greater than the entire sum, voted by all the townships.

Paragraph 16 of bill.
Record, pages 7 and 8.

And all this had been done upon the strength of the aid voted, and would not have been done except for such aid.

Paragraph 8 of bill.
Record, page 3.
Paragraph 14 of bill.
Record, page 7.

These circumstances would entitle the Railroad Company to a recovery on the bonds if it had them, and they entitle us to a recovery now.

The case of *Taylor vs Ypsilanti*, 105 U. S., 60, differs from this only in the facts that the Governor's certificate was given and the bonds were delivered by the State Treasurer to the Railroad Company. Taylor, the plaintiff and purchaser of the bonds in 1877, became such seven years after the Salem decision.

"He was aware, at the time of his purchase, of the before mentioned decision of the Supreme Court of Michigan,

adjudging municipal aid to be forbidden by law, and bonds issued therefor to be invalid."

Extract from opinion in Taylor vs. Ypsilanti, 105 U. S., p. 70.

So that in that case Taylor, the purchaser, was compelled to stand upon the rights of the railroad company as they existed, and the court considered the question the same as if the bonds had not been transferred at all.

This court holds that the situation of the parties is one of contract obligation, and that the rights of the parties are to be tested by the law as it was declared at the time the Railroad Company entered upon the construction of its road.

The court also holds that the aid voted amounts to a proposition to enter into contract relations, and the substantial beginning of the work as the acceptance of such proposition and the meeting of minds essential to the creation of the contract.

The court uses this language: "Testing the rights and obligations of the parties by the law of the State as declared by this court, and as declared and acted upon by all the departments of the state government at and before the time *the Railroad Company entered upon* the execution of its contract with the city, we should be obliged to reverse the decision of the court below."

Taylor vs. Ypsilanti, 105 U. S., p. 70.

Again in *Olcott vs. Supervisors*, 19 Wallace, 678, this court said: "This court has always ruled that if a contract when made was valid under the constitution and laws of a State as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or the judiciary will be regarded by this court as establishing their invalidity."

Olcott vs. Supervisors, 19 Wallace, 678.

This language was approved in

Taylor vs. Ypsilanti, 105 U. S., 72.

In *Douglass vs. County of Pike*, 101 U. S., 677, this court said: "The true rule is to give to a change of judicial construction in respect to a statute the same operation on contracts and *existing contract rights* that would be given to a legislative enactment."

Douglass vs. County of Pike, 101 U. S., 677.

In *New Buffalo vs. Iron Company*, 105 U. S., page 73, the validity and construction of the same statute were involved. The bonds were voted on May 22d, 1869. The same consolidation statute was in force as in this case. Its provisions are set out on page 74 of the case.

New Buffalo vs. Iron Co. 105 U. S., 74.

The bonds were executed by the township June 1st, 1869, and deposited with the State Treasurer. The road was finished February 1st, 1870. The Governor gave his certificate February 4th, 1870. The bonds were delivered to the consolidated company who held them till November 4th, 1874, four years after the Salem decision.

They were then transferred to the plaintiff *in payment of antecedent debts* due to it by the Railroad Company.

So that in that case the transferree was compelled to stand upon the equities of his transferror, and was placed in no better position by the transfer.

The court held that the bonds were obligations against the municipality.

The court says: "The plaintiff is entitled to whatever rights the railroad company had by virtue of *its contract* with the township.

This contract was made and fully performed before the decision in *People vs. Salem* was rendered, and as already indicated was not affected by the decision in that case."

New Buffalo vs. Iron Co., 105 U. S., 75.

In our case the Railroad Company had not finished its work, but it had expended more than a million dollars, and it was in

such a position that it was compelled to go on or submit to greater losses than the entire aid voted.

Even if this had not been so, we insist that the Railroad Company had vested rights in the contract which no judicial decision could undo. It was the law of Michigan as expounded by its courts, up to the time the contract was made, that the aid was valid. Acting under this construction, the Railroad Company accepted the vote and made such expenditures before the decision as to leave no doubt of the contract relations.

Neither the people in their sovereign capacity by changing the constitution, nor the Legislature as part of the law-making power, by legislative enactment, could divest these contract rights; and it is intolerable that a court can by judicial decision change the fundamental law of the land and destroy acquired contract ights.

The Salem decision had no more effect upon existing contracts, than a change in the constitution or statute would have had, and neither could have had any.

Concord vs. Robinson, 121 U. S., 165–171.
County of Moulton vs. Rockingham, 92 U. S., 631, 635.

The construction of the road was a performance of the contract by the railroad company, almost completed before the decision, and fully completed afterwards, and within the time prescribed by the vote. It entitled the company to have its bonds; and the return of them to the township, and their retention by the township ought not to prevent a recovery of their amount.

It is true, that in *Taylor vs. Ypsilanti* and in *Buffalo vs. Iron Company*, the contract had been fully performed before the Salem decision, but this circumstance does not in justice distinguish those cases from this.

Contract relations were created by the vote and by the doing of the work to a substantial extent; and being thus created, the State can not impair the obligations of such contract, either in its sovereign capacity by changing its constitution, or in any

of its departments of government, executive, legislative or judicial, or all combined.

A constitutional provision, a legislative enactment, a judicial decision can only act prospectively.

In this case the executive department through the Governor, sought by his refusal to furnish a certificate, to give a retroactive effect to the Salem decision. In this he mistook the law of the land, and this court will therefore regard the want of the certificate as of no force.

The State Treasurer, in violation of his duty as trustee, and also desiring to give a retroactive operation to the newly made law of the Salem decision, returned the bonds to the township; so that the railroad company (notwithstanding it had gone to work upon the expectation of receiving them, and had nearly finished the construction of the road when the decision was announced, notwithstanding it had earned the bonds, as is confessed by this demurrer) never received them, but they went back to the maker of them, who still holds them. Ought the township to profit by its wrong?

IX.

The remaining causes of demurrer may be grouped under one head. Substantially the defendant claims that the complainant has lost all remedy by delay.

As this is the reason for the decision of the court below, a brief re-statement of the facts, so far as they bear upon this point, may be advisable.

The bill shows that the Salem decision was announced May 26, 1870.

The road was fully completed February 1, 1871, and on that day application was made to the Governor for his certificate, which he then refused to give.

Record, p. 9.

The Railroad Company could not have procured a mandamus. The Supreme Court of Michigan in a similar case held that it would not issue the writ against the governor.

Sutherland vs. the Governor, 29 Mich., 320.

The State treasurer retained the bonds till May 28, 1872, at which time, knowing all the facts, he returned them to the township.

The only amount then due was the sum of one thousand dollars.

It is urged that all suits in favor of the Railroad Company and against the Township were cut off before the institution of this suit. The defendants' main reliance is on the statutes of limitation of the State of Michigan.

So far as they need be referred to, they are as follows:

"The following actions shall be commenced within six years next after the cause of action shall accrue, that is to say:

1. All actions of debt, founded upon any contract, or liability, *not under seal*, except such as are bought upon the judgment or decree of some court of record of the United States, or of this or some other of the United States.

2. All actions upon judgments rendered in any court other than those above excepted.

3. All actions for arrears of rent.

4. All actions of assumpsit, or upon the case, founded upon any contract or liability, expressed or implied.

5. All actions for waste.

6. All actions of replevin and trover, and all other actions for taking, detaining, or injuring goods or chattels.

7. All other actions on the case, except actions for slanderous words or for libels."

Howell's Annotated Statutes, sec. 8713, p. 2131.
Compiled Laws 1857, sec. 5361, p. 1406.
Compiled Laws 1871, sec. 7148, p. 1977.

"All personal actions on any contract, not limited by the fore-

going sections, or by any law of this State, shall be brought within ten years after the accruing of the cause of action, and not afterwards."

Howell's Annotated Statutes, § 8719.
Compiled Laws 1857, § 5367, p. 1407.
Compiled Laws 1871, § 7154, p. 1978.

Under these statutes it will be seen that trover outlaws in six years, and debt on a sealed intrument in ten years.

Trover is governed by subdivision 6, section 8713, of Howell's Annotated Statutes.

Howell's Annotated Statutes, sub. 6, § 8713, p. 2132.
Mich. Comp. Laws of 1857, p. 1406.
Mich. Comp. Laws of 1871, p. 1977.

Debt is governed by § 8719 of the same statutes.

Howell's Statutes, § 8719, p. 2133.
Mich. Comp. Laws of 1857, p. 1407.
Mich. Comp. Laws of 1871, p. 1978.

As this is a suit brought by a judgment creditor to reach whatever the railroad company might enforce, it is plain, that if, by any proceeding, either at law or in equity, the railroad company could succeed, then the present complainant ought to succeed against this township.

At the time of the return of the bonds to the township, which, as we have seen, was on May 28, 1872, only two had matured, namely bonds Nos. 1 and 2.

Paragraph 11 of the bill states that Nos. 1 and 2 would mature in 1871.

Record, page 6.

But by condition four on page 4 of the bill the times of payment on all the bonds were extended one year.

It is now contended by the township that in receiving the bonds the township was a joint participant with the State Treasurer in the conversion of the bonds, and that therefore a suit in

trover is the only suit that could have been brought against the township, and that as more than six years had elapsed since the taking of the bonds in May, 1872, before the bill in this suit was filed, namely, February 24, 1885, the railroad company was barred.

On the other hand, it is contended by the complainant that the township cannot improve its situation by its torts, and that the time of limitation is to be computed as if the bonds were sued upon as lost bonds, and that notice can be given to produce them, and recovery had just the same as if the township had not taken them. In the event of their non-production parol evidence can be given of their contents, and suits maintained upon the bonds as they mature.

No question is made that if the bonds were lost, recovery could be had upon them upon offering proper indemnity, and that in such case the railroad company would have ten years after each bond fell due in which to sue. Why it is that the participation of the township in the violation of the trust of the State Treasurer and his tort should benefit the township, it is hard to explain.

It will be seen that if the only remedy the railroad company had was in an action of trover, the railroad company would have been compelled to allow such rebate from the face of the bonds as a jury might find was the difference in their face value and their then present worth. Such bonds running on long time would have had a market value much less than their real worth, and it ought not to be allowed to a wrongdoer to say that he shall compel the rightful owner of the bonds to submit to such discount.

It is not necessary for us to consider whether the railroad company might or might not have sued in trover. It was entitled to have from the township for the purpose of turning them over to the present complainant, these bonds running on long time and bearing interest at ten per cent. It had a right to compel the execution of the trust.

The railroad company was not bound to sue in trover. It could sue in an action of debt on each instalment as it became due and maintain its action.

There is no difficulty in suing on a lost bond or a lost note, and there ought to be no difficulty in suing on a stolen one. If the bonds had not been taken by the township, but by some other wrongdoer, trover certainly would not lie against the township. No suit could then be maintained against the township except as each bond became due.

Now when the maker steals a bond which he himself has made, has he by his theft cut off from its actual owner any of his remedies? Is a thief to be allowed to say that, notwithstanding the bond is such that its owner can keep his money out for a series of years at ten per cent, the thief can by reason of his theft compel the holder to bring immediate suit for the whole amount?

It must be that the railroad company was not cut off from the advantage of postponing suit for a period of ten years. To hold such a doctrine is to reward the thief and punish the victim.

The railroad company therefore had the period of ten years from the maturity of each bond in which to bring its action of debt.

The suit was begun in 1885. At this time the following bonds and no others had outlawed:

Nos. 1 and 2, maturing March, 1872.

Nos. 3 and 4, maturing March, 1873.

Nos. 5 and 6, maturing March, 1874.

All the others were existing obligations against the township and capable of enforcement by the railroad company. They were rights properly available to creditors, and the right of the railroad company to sue for them has not been cut off by any statute of limitations.

Thers has been no delay by the present complainant. His suit was begun February 19th, 1884.

Record, page 1.

His judgment was obtained November 11th, 1884.

Record, page 1.

His execution was issued the next day.

Record, page 1.

It was returned unsatisfied December 4th, 1884.

Record, page 2.

His bill in this case was filed February 24th, 1885.

Record, page 15.

There can be no delay on the part of complainant, so long as there remains any right in favor of the Railroad Company against the township.

Record, page 15.

On this particular point we think the learned judge who heard this case in the court below, was in error.

X.

Since the decision of this case in the circuit, there has been decided in this court the case of

Smith vs. Bourbon Co., 127 U. S., 105.

That case resembles this in some of its features. But it is clearly distinguishable.

In that case no bonds had ever been issued, and the proper remedy was by mandamus to compel their issue. All other remedies were inappropriate.

In this case the bonds had been issued and deposited in trust for the Railroad Company, and by fraud and in violation of an existing trust were obtained by the township.

In that case there was no indebtedness, and no claim that any money was payable. In this there is a fixed and definite sum of money owing and payable at specified times and in specified amounts.

In that case the legal obligation was purely statutory, and consisted in the making and delivering of certain obligations to the railroad company. It was a purely ministerial duty, the breach of which could not give rise to an action for damages, but to an appropriate remedy to compel such issue.

In our case the ministerial duty had been performed in full, the bonds had been issued and delivered to the State treasurer, and were binding obligations on the township, and by the fraudulent act of the trustee, were returned to the township.

There are other considerations which entitle this company to complete relief in equity.

These bonds were deposited with the State Treasurer as trustee.

Section 5 of Act 45, Laws of 1869, page 91.
Record, page 12.

The trust follows the bonds wherever they may be.

The bonds, notwithstanding the return to the township, remained impressed with the trust imposed upon them, and for the purpose of declaring that such trust continues, the equity side of the court has jurisdiction. Such relief is as purely equitable as can be conceived; and as this court has such jurisdiction as between the railroad company and the township, it will, while it has such jurisdiction, further enforce such trust and decree the payment of the amount.

Another ground for equitable jurisdiction is the fraud of the State Treasurer in returning the bonds to the maker. It is not necessary to claim that any intentional wrong existed in the mind of the State Treasurer. It is sufficient that the giving up of the bonds is a legal fraud on the railroad company, and should be so declared and full relief given while this court has jurisdiction.

It is enough for a court of equity that these bonds were placed in the hands of the State Treasurer in *trust* to be by him delivered to the Railroad Company whenever he should receive a certificate from the Governor that the work was done, and that the State Treasurer, under a claim that the law was unconstitutional, has disavowed the trust relation, and has delivered the bonds to the township.

These facts are admitted by the demurrer. The only question is, do they furnish ground for equitable jurisdiction?

It is the settled law of this court that "in cases of trust, where the trustee has violated his trust by an illegal convestion of the trust property, the *cestui que trust* has a right to follow the trust property into whosesoever hands he may find it, not being a *bona fide* purchaser for a valuable consideration without notice."

Oliver vs. Piatt, 3 Howard, 333-401.
Seymour vs. Freer, 8 Wallace, 202-214.
May vs. Le Claire, 11 Wallace, 217-231.
Duncan vs. Jaudon, 15 Wallace, 165.
National Bank vs. Insurance Co, 104 United States, 54.

If these bonds had been transferred to some other person than their maker, the Railroad Company would have an undoubted right to follow them into the hands of the transferee.

The maker of the bonds had no more right to receive them from the trustee than a stranger would have had, and the power to follow the bonds when they have gone into the hands of the maker is co-extensive with the power to follow them when they have gone into a stranger's hands.

In either case the jurisdiction of the equity court is complete to declare that the trust continues impressed upon the trust property notwithstanding the disavowal by the trustee, and the transfer of the bonds.

In *Oliver vs. Piatt*, 3 Howard, 333, the question was whether the trust did or did not continue in a body of land. The case is very long, and the facts numerous. Justice Story delivered the opinion. In it he says: "It is a clearly established principle in equity jurisprudence, that whenever the trustee has been guilty of a breach of the trust, and has transferred the property, the *cestui que trust* has a right to follow such property into the hands of such third person, unless he stands in the predicament of a *bona fide* purchaser for a valuable consideration without notice."

Oliver vs. Piatt, 3 Howard 401.

The court declared the continued existence of the trust, decreed a personal liability for moneys collected on sales, and ordered execution.

Oliver vs. Piatt, 3 Howard, 355.

In *Seymour vs. Freer*, *8 Wallace*, *202*, the court says that "trust rights, to the extent to which they exist, constitute an equity, which a court of equity will protect and enforce, whenever its aid for that purpose is properly invoked."

Seymour vs. Freer, 8 Wallace, 213-214.

If the property had been transferred, a court of equity would have followed it and dealt with it in all respects as "if the title had remained in Seymour. If a valid sale had been made, the trust would have followed and bound the proceeds in like manner as it bound the property."

Seymour vs. Freer, 8 Wallace, 214.

The court further says: "An action at law, sounding in damages, may undoubtedly be maintained in such cases for the breach of an express agreement by the trustee, but this in no wise affects the right to proceed in equity to enforce the trust. They are concurrent remedies. Either may be selected. *The remedy in equity is the better one.* The

right to resort to it admits of no doubt, either upon principle or authority."

Seymour vs. Freer, 8 Wallace, 215.

In this case there was a dissenting opinion not in any way affecting the doctrine quoted.

In *May vs. Le Claire* the facts are numerous. It is not necessary here to review them, further than to say that the court reached the conclusion that the conduct of the trustee in making the sale was fraudulent, and that Le Claire became constructively the trustee of the acquired property.

The case is instructive here, for the reason that counsel contended that if money compensation was asked, "the case became a claim for damages, and therefore a case for law and not for equity."

May vs. Le Claire, 11 Wallace, p. 227.

Justice Swayne, speaking for the court, says: "At law in many cases, if property be tortiously taken or converted, the tort-feasor may be sued in trespass or trover, or the injured party may waive the tort and sue in assumpsit. In the latter case the same results follow as if there had been an implied contract. The plaintiff is *not permitted to set up his tort to defeat the action*, and the recovery of a judgment will bar a futher action *ex delicto* for the property. In the same class of cases, where the converted property has assumed altered forms by successive investments, the owner may follow it as far as he can trace it, and sue at law for the substituted property, or he may hold the wrong-doer liable for appropriate damages."

"There are kindred principles in equity jurisprudence whence indeed these rules of the common law seem to have been derived. Where a trustee has abused his trust, the *cestui que trust* has the option to take the original or substituted property."

"The cardinal principle is that the wrong doer shall derive no benefit from his wrong. The entire profits belong

to the *cestui que trust*, and equity will so mould and apply the remedy as to give them to him."

"In cases of specific performance, to which category the case before us belongs, parties are sometimes remitted to a court of law, but this is never done where the remedy is not as effectual and complete there as the chancellor can make it. Equity sometimes takes jurisdiction on account of the *parties* and sometimes on account of the relief to be administered."

"*The same considerations which invoke the jurisdiction may control the remedy.*"

May v. Le Claire, 11 Wallace, pages 235 and 236.

The court gave a money decree, embracing the value of the land.

May v. Le Claire, 11 Wallace, 236.

This case is applicable to this in more than one particular.

1st. It shows that the township in this case can neither prevent these bonds from continuing impressed with the trust that was upon them, nor can it say that we must sue within the period of time prescribed by statutes of limitation for the action of trover.

2d. It also shows that as the equity court has jurisdiction to declare the fact of the trust and its continuance, that jurisdiction is not defeated because of the joint participation of the township in the wrongful surrender of the bonds, nor because the township may be liable on the bonds themselves.

The State Treasurer having claimed that the railroad act was unconstitutional, and thus having disavowed the trust, and the township having participated in such disavowal by taking the bonds, the propriety of an appeal to equity to declare the trust can not be open to question. If the township had delivered or offered to deliver the bonds

to the railroad company, it might with some show of reason be urged that the remedy of the railroad company on the bonds themselves was complete and effectual; but so long as the bonds are withheld by the township, the disavowal of the trust is persisted in, and the aid of the equity court is appropriate to declare the existence of the trust. Besides while the township retains the bonds, the remedy in equity is more effectual and complete than one at law can be. If the railroad company had sued the township at law, it might be answered, that as the bonds had not been delivered to the railroad company, it never held the legal title to them.

It is not necessary now to consider this. Certain however it is, that the bonds never were delivered to the railroad company, and it is equally certain that the State Treasurer never received the Governor's certificate. It may well be doubted whether this equitable ownership is sufficient to maintain trover or an action at law on the bonds. Under the statute the legal right to have the bonds delivered is made to depend on the delivery of the Governor's certificate, and as this as never been had, the right of the Railroad Company to enforce a purely legal remedy is rendered less complete and effectual than if the Governor's certificate had been given. It is one of those cases in which a court of equity can more readily say that it will consider the certificate as having been given. It is doubtful if this could be done at all, on the law side of the court.

In *Duncan vs. Jaudon*, 15 Wallace, 169, the equitable jurisdiction of the court was placed on the ground that the securities were *trust* property. The court decreed that Duncan Sherman & Co. should account for the value of the shares pledged to them and sold, with the dividends that would have been received upon them including interest on the dividends, had they not been diverted from the trust. It is just such a decree as we ask here.

Duncan v. Jaudon, 15 Wallace, 165.

The doctrine is well illustrated in

National Bank vs. Insurance Co., 104 U. S., 59.

In that case a bill was filed, claiming that a certain balance that remained charged in the account of A. H. Dillon, Jr., of $11,000.86, was a fund, received by him in a fiduciary character as the agent of the complainant, which complainant had a right to follow. An amended bill was filed, praying among other things a declaration that the fund was a trust fund, of which complainant was the beneficial owner. The cause was removed from the State court to the Circuit Court of the United States, and in the latter court, *payment* of the amount claimed was decreed, with interest. It was a pure money decree.

Nat. Bank. vs. Ins. Co., 104 U. S., p. 61.

Upon appeal by the bank to this court, the decree was affirmed. In the opinion written by Justice Matthews there is an extensive review of the cases bearing upon this subject, and the jurisdiction of equity over *trusts* is fully maintained.

In the course of his opinion in speaking of the case of *Knatchbull vs. Hallett* (*in re* Hallett's Estate, 13 Chancery Division), he cites with approval the equity doctrine laid down therein by the Master of the Rolls, Sir George Jessell, that "as regards property disposed of by persons in a fiduciary position, it is, that whether the disposition be rightful or wrongful, the *beneficial owner* is entitled to the proceeds, whatever be their form, provided only he can identify them. If they cannot be identified by reason of the trust money being mingled with that of the trustee, then the *cestui que trust* is entitled to a charge upon the new investment to the extent of the trust money traceable into it, and there is no distinction between an express trust and an agent, bailee, or collector of rents, or any body else in a fiduciary position; and that there is no difference between investments in the

purchase of lands or chattels, or bonds, or loans, or moneys deposited in a bank account."

Of these bonds the railroad company is the beneficial owner. It was entitled to file its bill in equity to have this beneficial ownership declared, and a decree made that they were impressed with the fiduciary relation, and that the wrongful delivery to the township has not destroyed that relation. The railroad company having never been invested with the legal title to the bonds, a remedy in trover or an action of debt on the bonds is rendered less capable and probably impossible of enforcement. The railroad company could not sustain an action for money had and received, for the contract of the township to pay money is purely executory, and no money had ever been collected on the bonds.

A decree saying that the complainant in this case shall stand as the equitable assignee of the railroad company as was done in the case of *Smith vs. Bourbon* would not avoid the necessity of another suit in equity to declare the equitable ownership in the railroad company. Assenting to the doctrine of *Smith vs. Bourbon County*, that, where a creditor's bill is filed, and it appears that the defendant sought to be held is only liable on the law side of the court to the judgment debtor, the decree of this court will be restricted to saying that the complainant shall stand as the assignee of the right of the judgment debtor; we insist that when as between the judgment debtor and the other defendant, the right is one to be enforced in equity, this court will at once dispose of every question involved in the case, and will make such decree against the other defendant as the judgment debtor would have been entitled to had the judgment debtor filed his bill against such other defendant.

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Office Supreme Court U. S.
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OCT 16 1889
JAMES. H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 34.

JOSEPH E. YOUNG, APPELLANT.

vs.

THE TOWNSHIP OF CLARENDON AND THE MICHIGAN AIR LINE RAILROAD COMPANY.

BRIEF ON BEHALF OF TOWNSHIP.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

THE SUPREME COURT OF THE UNITED STATES.

JOSEPH E. YOUNG, COMPLAINANT AND APPELLANT,

vs.

THE TOWNSHIP OF CLARENDON AND THE MICHIGAN AIR LINE RAILWAY COMPANY.

Young, a judgment creditor of the railway company, filed his bill in equity in the Circuit Court for the Eastern District of Michigan to compel the defendant township to pay certain bonds voted June 21st, 1869, to "aid the Michigan Air Line Railroad Company in the construction of its road, by a loan of the sum of ten thousand dollars," upon certain terms and conditions.

The township demurred specially. The court sustained the demurrer and dismissed the bill.

I assume that the demurrer raises certain legal questions and shall proceed to discuss some of them, making such reference to the facts, from time to time, as may be necessary to a clear understanding of the case.

I.

AS TO THE CONSOLIDATION.

The loan was voted to aid the Michigan Air Line Railroad Company.

At the time the aid was voted, June 21st, 1869, and the bonds deposited with the State Treasurer, July 23d, 1869, the Michigan Air Line Railroad Company was a corporation formed August 28th, 1868, by a consolidation of the Grand Trunk Railway Company of Michigan and the Grand Trunk Railway Company of Northern Indiana.

After the bonds were thus voted and deposited, viz.: October 8th, 1870, the said Michigan Air Line Railroad Company, it is alleged, consolidated with the St. Joseph Valley Railroad Company, and such new consolidated company retained the name of the Michigan Air Line Railroad Company.

It is against this last company that the plaintiff Young recovered his judgment, and in this action he is proceeding against the township as a debtor of this company formed under the second consolidation.

The townships have not, at any time or in any way, had any dealings with this company. Upon this question of fact the learned district judge was in error. Record, p. 25. As against the township it must therefore appear that the present Michigan Air Line has become by consolidation the legal successor of the corporation with which the townships did have dealings.

The bill of complaint alleges a consolidation with the St. Joseph Valley Railroad Company October 8th, 1870, but does not allege any facts showing consolidation. Under the Michigan statutes, certain railroads forming a continuous or connected line may consolidate by observing the following requisites:

1st. The directors of the two corporations must enter into an agreement under the corporate seal of each, for the consolidation, prescribing the terms thereof, etc.

2d. Such agreement of the directors shall not be considered the agreement of the corporations until after it has been submitted to the stockholders of each of said corporations, and sanctioned by such stockholders.

3d. Thirty days' notice of such stockholders' meetings must have been given.

4th. The agreement thus made and sanctioned must be filed in the office of the Secretary of State.

Acts of 1855 and 1859.

Until these several steps are taken there is no consolidation; and upon trial the corporation must prove the same to have been taken.

Peninsular Railway Co. *vs.* Tharp, 28 Mich., 506.

Mansfield, etc., R. Co, *vs.* Drinker, 30 Mich., 124.

"The consolidation creates a new and distinct corporation, and any declaration against this for an old cause of action should show against what company it arose, *and aver such facts as will subject the new company to be sued upon it.*"

M. H. & O. R. R. Co. *vs.* Langton, 32 Mich., 251.

This is in accord with well settled rules of pleading.

The latest consolidated company derived its right, if any, by operation of law. Upon the performance of certain things precedent, the statute of the State of Michigan transferred to the consolidated company the rights of those from which it was formed. It is not sufficient in a bill in equity to allege the fact of consolidation at a certain date, without setting forth the essential facts which were necessary in order to effect a consolidation.

At law, and under the common law principles of pleading, it would be necessary for the purpose of claiming under such circumstances, not only to plead the statute, but count on it.

As was said by the Supreme Court of Michigan in Howser *vs.* Melcher, 40 Mich., 189: "Pleading the statute is stating the facts which bring the case within it, and counting on it, in the strict language of pleading, is making express reference to it by apt terms to show the source of right relied on."

As was said by this court in St. Louis *vs.* Knapp Co., 104 U. S., 661: "There are some cases in which the same decisive and categorical certainty is not required in a bill in equity as in a declaration at common law, but in most cases, general certainty is sufficient in pleadings in equity." What this general certainty, or reasonable certainty, as the term is more frequently used in equity, is, has been set forth by Adams very clearly, as follows: "It (the bill) must state the case in direct terms and with reasonable certainty, not necessarily the same technical precision as at law, but with a sufficient precision to show that there is a definite equity, and if the equity depends on a title to property in the plaintiff, the statement must show a sufficient title in point of law; *e. g.*, the statement of a devise must allege a will in writing; the statement of a grant must allege a deed; the statement of a title by heirship must show the manner of descent. But if the title as stated would have been valid at common law, and regulations have been superadded by statute, it is not essential, though usual, to state compliance with them." Page 638.

In the note, and also in 1st Barbour's Chancery Practice, many illustrations are given of the application of this rule. Thus it is said: "Where a bill is filed by persons in the character of legatees, and it neither sets out in its body the contents of the will, nor has a copy of it annexed, a demurrer by the defendant would be sustained, for the court cannot see that the plaintiffs are legatees." "If the complainant relies upon a mere right or legal obligation or duty, it

will not be sufficient to allege generally such right or legal obligation or duty, but he must state the facts which raise or constitute it, and the circumstances out of which it arises; and whether at common law or in equity, where a party claims under a statute, it is necessary to state all the facts constituting the cause of action under it. The object of this is that every material obligation may be put in issue by the pleadings, in order that the parties may be duly apprised of the essential inquiry, and be enabled to admit or deny the same, and collect testimony to meet it."

In the present case, the allegation of a consolidation is but a conclusion of law from facts not stated. The answer may be a denial equally general, and neither party, until the evidence is in and the argument reached, can be apprised of the real and serious objection.

Certain English cases are also in point.

Allegation that defendant is trustee for plaintiff, without setting up facts constituting trusteeship, will not prevent a demurrer.

Jackson *vs.* North Wales R'y Co., 6 Rail. Cas. 112, 13 Jur., 69.

Steedman *vs.* Marsh, 2 Jur. N. S., 391 V. C. W.

So also a statement that defendant claimed interest under an agreement, but that such agreement, if any, had long since been abandoned and waived, without setting up facts.

Hodgson *vs.* Espinasse, 10 Beav., 473, 477.

If the several requisites were alleged in the bill, the answer might admit one and deny another.

An allegation simply alleging consolidation would be equally well met by an answer denying it, and thus the pleading throw no light upon the subject.

The distinction between alleging facts and the evidence of such facts is clear.

Thus the allegation that the directors of the two corporations did at a time named enter into an agreement under the seals of their respective corporation would be stating a fact.

The evidence of such fact would be the agreement, and so of the other essentials.

This omission to allege facts was not accidental or through want of skill in the pleader, but because the facts would not permit a more full statement.

Take, then, the general allegation of this bill, in view of the decision of the Supreme Court of Michigan in Tuttle *vs.* Michigan Air Line Railway Co., 35 Mich., 247–53, where the court expressly decided that the consolidation in question was illegal, and I respectfully submit there should be no doubt as to the result arrived at in this case.

In that case the court said, speaking of the second consolidation (of October 8, 1870), and quoting from the statute in reference to consolidation: "The directors of said two or more corporations may enter into an agreement under the corporate seal of each, for the consolidation of the said two or more corporations." * * * * "Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations until after it has been submitted to the stockholders of each of said corporations separately, at a meeting thereof to be called as aforesaid.

And the court held "that before any steps are taken to call the stockholders together, there must be some agreement actually made by the directors." That "it is an agreement to be ratified, and not a proposition to be accepted, which is to be acted on by the stockholders. That agreement is the first step in the proceedings to consolidation."

The court also held that under the act of 1859, thirty days' notice must be given by publication to the stockholders, and that in the case under consideration, as but five days' notice was given, which was neither published or personally served, and was not to ratify an agreement made, but to vote upon "the proposition to consolidate with," etc., such second consolidation was irregular, etc.

It is respectfully submitted, therefore, that the plaintiff has not in his bill shown that the judgment debtor railroad company ever had any cause of action or claim against the townships.

The case of Detroit, etc., R. R. Co. *vs.* Starnes, 38 Mich., 698, cited by counsel for plaintiff, does not bear upon this question. The point

there discussed related to the weight or sufficiency of evidence before a jury.

It will be argued, however, that the building of the road was the consideration for the aid in question, and that it is immaterial by what corporation the road was in fact constructed.

This would be true in certain cases, but is not in the present, and this leads to our second proposition, as follows:

II.

THE RELATIONS BETWEEN THE TOWNSHIP AND RAILROAD WERE NOT THOSE OF DEBTOR AND CREDITOR.—THE BONDS WERE INTENDED AS A LOAN, NOT A DONATION.

The aid voted was by a loan of the bonds of the township, to be repaid by the corporation receiving the loan.

A sum equal pro rata to dividends paid to stockholders was to be paid the township, ten per cent. of which was to be received and applied in payment of interest upon the loan, and any sum over that amount to be applied in reduction of the principal, until the principal should be fully paid.

Section one of the statute authorized aid to be pledged "by loan or donation with or without conditions."

It is clear that the aid here voted was a loan.

The condition does not contemplate that the railway company shall pay only in dividends; that if no dividend is declared, or less than ten per cent. annually, then that these bonds shall never be repaid.

These bonds being by way of loan, the company could not sue the township for the amount agreed to be loaned, and this for various reasons.

Where any judgment is recovered, it imports an absolute indebtedness, and upon that subject is conclusive. It is utterly inconsistent with the idea of a loan.

Under such a state of facts, the township is not owing the railroad any liquidated sum whatever.

Stanley *vs.* Nye, 51 Mich., 232.

In opposition to this counsel for plantiff cites (page 16 of his brief)—New Buffalo *vs.* Iron C., 105 U. S., 73. In this case "The bonds were voted on the 22d day of May, 1869, as a donation in favor of the Chicago and Michigan Lake Shore Railroad Company."

The court say, "Nor is it a material circumstance that this was a donation and not a subscription of stock."

But how is it in case of a loan?

An individual desiring to loan money or the credit of his name has an undonbted right to select his debtor.

A may agree in writing to indorse the note of B, the proceeds to be used for a certain specified purpose. B cannot assign this agreement to C, nor can he take C into copartnership with him to carry out the purpose specified, and insist the credit shall be given to both. It is the lender who has the right of selection; and what is true of an individual is equally true of municipalities. And in such a case neither the legislative nor judicial departments have the legal right to make A accept another.

This is not a matter of form but of substance.

A person agrees to loan another a sum of money to clear up a tract of land, the loan to be repaid from the proceeds of the crops.

Or to build a hotel, payable out of the profits.

The clearing of the land or building the hotel would not alone be the consideration; the character and reputation of the man who was to cultivate the soil, or of the man who was to build and operate the hotel, would be at least one of the controlling influences.

So a hotel of a certain size and style might present to the lender reasonable prospects of being profitable and enabling the owner to repay the loan, while a much larger one would be known to prove disastrous.

The first Michigan Air Line Railroad Company may have presented prospects of success, while the addition added by the second consolidation may have destroyed all such hopes.

But this is not a question to speculate upon. It was such a change as released the township.

III.

THE REMEDY AT LAW HAD NOT BEEN EXHAUSTED AT THE TIME THE PRESENT BILL WAS FILED.

We concede the general rule to be that the return of an officer upon an execution is conclusive between the parties, and cannot be disputed. We concede, also, that the judgment creditor need not point out property to the officer. Putting the execution in the officer's hands is sufficient. It is, however, equally clear that where the officer is directed not to levy on property, or where property is brought to his notice from which his execution may be satisfied, and he does not levy thereon, a creditor's bill to reach equitable assets cannot be maintained. In other words, it must appear that the creditor has in good faith completely exhausted his remedy at law.

Thus in Freeman *vs.* The Michigan Savings Bank, Walk. Ch., 62, the judgment debtor had property in counties adjoining the one to which the execution was directed, and so informed the judgment creditor. This was set up by plea. It was held an *alias* execution should have been issued to such counties, and this not having been done, it could not be said the creditor had in good faith exhausted his remedy at law.

If the bill were silent upon this matter, the presumptions would be in favor of regularity. But the present bill shows affirmatively that the judgment debtor possessed ample property when the execution was issued and returned.

The bill alleges that the defendant debtor, on Feb. 1, 1871, had fully constructed and in full operation between Jackson and Niles 107 miles of road; that it was properly equipped and was regularly operating business upon it, and has continued to until the present time.

And on page 12 it is alleged that one million dollars and upwards were expended in constructing a part of this road. There is no presumption of law that this property is encumbered. There is no allegation or intimation that it is. The presumption is that the pleader has stated his case as strongly as the facts will warrant, and all intendments are against him.

The bill as originally filed did not contain an allegation that the same was not exhibited by collusion with the defendant, etc., as required by Equity Rule C. C. 6.

This omission was afterwards permitted to be supplied.

See stipulation, Record, p. 23.

But the amendment thus made was not, nor was the bill as amended, sworn to as required by Equity Rule C. C. 7.

Further than this, it is alleged in the bill that the railroad extended to Niles in the western district.

The marshal's return is simply that he found no property in his bailiwick.

His district is his bailiwick.

But by statute he has a right to go over into the western district and levy execution on property there.

U S. Rev. St., Sec. 985.

There is no showing whatever, either in the bill or return, that any steps of this sort have been taken, though the bill alleges that property there existed.

This shows plainly that the remedy at law was not exhausted.

As the basis for a creditor's bill, an execution on a judgment should have been in good faith issued, and should be returned unsatisfied by the officer upon a reasonable and actual but ineffectual effort to find property. If the return shows upon its face a failure in this respect, there is no foundation for equity jurisdiction.

Bassett *vs.* Orr, 7 Biss. (C. C.), 296.

In still other respects the remedy at law had not been exhausted.

It appears from the allegations of the bill that the railroad company, from time to time, as sections of its road were completed, furnished proof thereof to the Governor, and requested his certificate in accordance with the Act, which would entitle the company, upon presentation thereof to the State Treasurer, to receive some of the bonds, and that the last application was made to the Governor, February 1, 1871, under which the company would be entitled to all these bonds.

It is also alleged that the Governor admitted that the company had completed its road, and was entitled to the bonds, but refused to issue his certificate, giving as his reason the decision of the Supreme Court in the Salem case. Record, pp. 8, 9. (Sec. 6 of the Act, Record, p. 12.)

It also appears that the Salem case was decided in the Supreme Court, May 26, 1870, and that the company had notice thereof. Record, p. 7.

The effect of this decision and notice thereof to the corporation, and of the refusal thereof of the Governor to issue his certificate for the reasons stated, was certainly a clear and emphatic notice to the corporation that these bonds would not be delivered to it by the State Treasurer, or the municipality issuing the same.

Bonds surrendered May 28, 1872.

The corporation should thereupon have taken prompt steps to protect its interests.

What remedy, then, did it have?

If the theory of the present bill be correct, that the corporation after its agreement with the township, and deposit of the bonds with the State Treasurer, by proceeding to construct its road had thereby acquired a vested interest in the bonds, then the law would surely afford a remedy.

If such facts did not give it a vested interest in the bonds, it would not then or now have any remedy.

But assuming it had acquired such vested interest, and was entitled to the bonds February 1, 1871, then what was its remedy?

I submit it had a remedy.

First: By mandamus to the State Treasurer.

Second: Possibly by bill to compel a delivery of the bonds, where the facts might be such as to call for the interference of a court of equity.

The bill alleges that on May 28, 1872, the State Treasurer surrendered up and delivered these bonds to the township, which has since then retained and withheld them from the possession of the company.

It is alleged this was done without the knowledge or consent of the corporation, and in fraud of its rights.

It is not stated how long it remained in ignorance of such surrender. Ordinary diligence would have brought to it knowledge of such surrender, and in a case like the present, the corporation must point out

why it could not or did not obtain the information, where it seeks to excuse its delay.

New Albany *vs.* Burke, 11 Wall., 96.
Marsh *vs.* Whitmore, 21 Wall., 185.
Richards *vs.* Mackall, 124 U. S., 183.

I doubt whether trover would lie, even if we treat the destruction by the township as a conversion. If so, the measure of damages would be the face of the bonds, and thus the wrongful act of an officer would make the full amount due at once, as the judgment would be for $10,000 and interest.

If not destroyed, and even if destroyed, mandamus could have been resorted to to compel a delivery to the corporation, or, if destroyed, a re-issue and delivery.

In Smith *vs.* Bourbon County, 127 U. S., 105–110, the facts in brief were, that bonds had been voted and the Board of Commissioners of Bourbon County had subscribed to the stock of the railroad company, and had voted upon it at meetings of the corporation.

In the meantime Smith, the judgment debtor, had made a contract with the railroad company to construct a portion of its road and receive in part payment the bonds ($125,000) of Bourbon County. Before making this contract Smith had assurances from two of the commissioners that the bonds had been legally and regularly voted, and that they would be issued on the completion of his contract. Afterwards the board, on application of the railroad company, ordered the bonds to be prepared, signed and deposited in the Treasurer's office to await further order, and the bonds were so deposited. After the road was completed in accordance with the terms of the subscription, the railroad company demanded the bonds, which demand was refused, and the bonds were ordered to be and were destroyed.

The plaintiff filed a judgment creditor's bill upon the above facts, and prayed an assignment by the railroad company to him of the bonds, and a decree against Bourbon County and its commissioners, ordering them to sign and issue the bonds in accordance with the terms of subscription.

The court said:

"On the supposition that the subscription creates a legal obligation for its payment in bonds, the refusal of the commissioners of the county to issue and deliver the bonds, however wrongful, is not a breach of the obligation of the county which would give rise to any action against it for the recovery of damages. The breach of obligation in such a case would consist simply in the refusal on the part of the commissioners of the county to perform a ministerial duty, the only remedy for which would be a proceeding at law in the name of the railroad company by a writ of mandamus. That writ, if granted in a direct proceeding therefor by a proper judgment, would be directed against the officers of the county, and would command the performance of the specific duty which they had refused to perform, and would give to the company the precise and specific relief to which it would be entitled."

We submit, therefore, that the remedies which the law afforded were not resorted to, and that the present plaintiff is chargeable with the defaults of the corporation.

It may be urged on the part of the plaintiff, that the railroad company would have had to proceed in the State courts, and that in these, on account of the Salem decision, its rights to the bonds, whatever they might be, probably could not have been enforced.

It is admitted law that for a creditor's bill to be maintainable, all legal remedies must have been exhausted.

Adsit *vs.* Butler, 87 N. Y., 585.

See also the case of

Taylor *vs.* Bowker, 111 U. S., 110.

In which this court lays down the rule very broadly, holding that legal remedies must be formally exhausted, and this, even when the debtor company had gone out of existence. The court says, "It is true that the corporate property was in the possession and charge of the trustees when the execution issued, and the effort to levy it became perhaps a form, but as was well said by the circuit judge, it is by no means certain, in view of the strictness with which statutory provisions are often required to be followed, that if this form had been neglected the defendant might not have successfully contended that the com-

plainant had neglected to meet the requirements of the statute." But the court goes on to say that the trustees might, for aught that the judgment creditors knew, have caused the judgment to be satisfied.

Thus it is clear, the fact that a creditor may believe, even with reason, that proceedings at law would be ineffectual, does not excuse him from resorting to such proceedings, and carrying them to final termination.

It cannot be said that where there is a strong prospect of failure, one is excused from pursuing his legal rights, *i. e.*, that one has a legal remedy when the chances are good for the courts to decide in his favor, and has no legal remedy when the chances are adverse.

If we were to admit this possible contention of complainant, no time would run against these bonds, since the argument that there never was a time when a right of action accrued would hold equally good at any time.

Its effect, also, would be to permit the judgment creditor to come upon the townships at any time with greater rights than the railroad had.

This plainly cannot be permitted, for if the railroad cannot collect these bonds, a judgment creditor cannot do it.

IV.

LACHES.

From the time the Governor refused to give his certificate until the time the present bill was filed, fourteen years had elapsed.

From the time the bonds were surrendered up by the State Treasurer, thirteen years had elapsed.

It does not appear that during this time the railroad company took any steps to get possession of these bonds or the proceeds thereof or ever made demand upon or called the attention of the township thereto.

The township had offered to loan its credit, it had in a very emphatic manner withdrawn that offer, the railroad company knew or had the means of knowing the facts, yet it stood by for thirteen to fourteen years silent.

In the meantime the bonds may be said to have been maturing. They were payable, $1,000 each year, commencing March 1st, 1871, and ending March 1st, 1880. Interest at 10 per cent. was payable annually.

The bill in the present case was filed February 24, 1885. So that at that date all the bonds were past due.

The people in voting this loan agreed to pay $1,000 per year with interest. When this action was brought, the bonds with interest amounted to about *twenty-six thousand dollars*, and at present would be over *thirty thousand dollars*. All of which would have to be met at once, as the court could not apportion it.

Under the Michigan statute, the amount of the judgment or decree would be certified to the supervisor of the township and the amount thereof levied and collected in one year. It could not be extended over a series of years. Yet the statute under which these bonds were issued provided that the amount due and collectable in any one year should not exceed two per cent. of the assessed valuation.

In the meantime the people of the township for fourteen years, or until this bill was filed in 1885, in the utmost good faith, were of opinion that the railroad company had no claim against them. None had been made. Real estate must have changed hands, and to now permit such an indebtedness to be enforced would certainly be harsh and inequitable.

The equitable principles applicable to such a state of affairs have been clearly enunciated by this court. In Richards *vs.* Mackall, 124 U. S., 187, this court said: "In Badger *vs* Badger, 2 Wall., 87–95, it was said that a party who makes an appeal to the conscience of the chancellor should, 'set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill; otherwise the chancellor may justly refuse to consider his case, on his own showing, without inquiring whether there is a demurrer or formal plea of statute of limitation in his answer.' So in Sullivan *vs.* Cortland, etc., Railroad Co., 94 U. S., 806, 811: 'To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation be laid by any averment in the answer of defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief.' In the latter case, it was said that equity would sometimes refuse relief where a shorter time than that prescribed by the statute had elapsed without suit."

The present plaintiff has and can have no other or greater rights against the township than are vested in the railroad company.

Smith *vs.* Bourbon Co., 127 U. S., 110.

If the railroad company by its laches equitably released the township, this plaintiff cannot revive the cause of action.

This case is important in another aspect. It is made a test case.

Other municipalities had pledged their credit to this road under like circumstances to an amount aggregating $332,000, which, with interest thereon to date, amounted to over *one million dollars*. All these bonds were surrendered up and destroyed, and no effort made to collect until the present bill was filed.

Sixty-two municipalities in Michigan voted aid, by donation and loan, to twenty-seven different railroads in sums of from $4,000 to $300,000, and aggregating in amount $3,722,875.

Prior to the decision in the Salem case, May 26, 1870, $361,400 of these bonds had been delivered, leaving in bonds undelivered and since surrendered and cancelled $3,361,475. Add twenty years' interest at ten per cent. without compounding, and we have the modest sum of over *ten million dollars which may be collected*, if the plaintiff's theory can be maintained, and creditors of these railroad companies found to commence proceedings.

V.

THAT THE BONDS WERE HELD IN TRUST.

Counsel for plaintiff further insists that the State Treasurer held these bonds in trust, and in violation of his duty as trustee he delivered the bonds to the township; that in cases where a trustee has violated his trust by an illegal conversion of the trust property, the *cestui que trust* may follow it into whosever hands he may find it, not being a *bona fide* holder.

Even if we should admit this doctrine as applicable, yet it but furnishes another argument against this plaintiff.

The *cestui que trust* in this case is the railroad company, and if it, upon the delivery of the bonds to the township, could follow them and had a remedy, its neglect for thirteen years to pursue that remedy, or resort to it, would be a sufficient defense in the present case.

But the argument of plaintiff's counsel upon this trust theory is based upon the principle that "the trustee has violated his trust by an illegal conversion of the trust property."

Brief, p. 29 *et seq.*

Without attempting to pursue this question, I deem it sufficient to refer to the People *vs.* Salem, 20 Mich., 452, and Bay City *vs.* The State Treasurer, 23 Mich., 499.

The State Treasurer declined to deliver up to Bay City railroad aid bonds, and application was made for a mandamus. The court said, *p. 502*:

"The State Treasurer, we have no doubt, is acting in good faith in awaiting the order of this court before delivering up the bonds as requested. We assume that he desires the advice of the court as to his duty in the premises, and that it is not his purpose or desire to cause unnecessary trouble, litigation or expense to the municipal authorities. *By way of giving such advice, and in order to render any future application of this character unnecessary*, we repeat at this time the main point of our previous decision."

The writ was issued.

I respectfully submit, the State Treasurer could not refuse to deliver up bonds for cancellation after the clear language above quoted; and that neither he in delivering, nor the township officers in receiving and cancelling, could be said to have violated their "trust by an illegal conversion of the trust property."

The decree of the court below dismissing the bill should be affirmed.

ISAAC MARSTON,
Of Counsel for Defendant Township.

Supreme Court U. S.
FILED.
APR 23 1889
JAMES H. McKENNEY
Clerk

SUPREME COURT

OF THE

UNITED STATES.

No. 288.

JOSEPH E. YOUNG,
Appellant,
vs.
THE TOWNSHIP OF CLARENDON AND THE MICHIGAN AIR LINE RAILWAY COMPANY.

Appeal from Circuit Court of the United States for the Eastern District of Michigan.

Brief for Defendant, the Township of Clarendon.

GIBSON & PARKINSON,
Solicitors for Defendant Township.

MARSTON, COWLES & JEROME,
Of Counsel.

JACKSON:
CITIZEN PRINTING HOUSE.
1889.

The Supreme Court of the United States.

JOSEPH E. YOUNG,
Complainant,

vs.

THE TOWNSHIP OF CLARENDON AND THE MICHIGAN AIR LINE RAILWAY COMPANY,
Defendants.

BRIEF FOR THE TOWNSHIP DEFENDANT.

I.

1st. The first three paragraphs of the demurrer relate to the consolidations of these several corporations, viz.: The bill alleges the first consolidation was with an Indiana corporation, and it is not alleged that the Indiana corporation had any power or authority to consolidate.

This is not a case where the power to contract can be presumed. A corporation has no such common law power. It must have the sanction of the Legislature of the State in which it was organized.

Green's Bryce, on Ultra Vires, 632, n. and cases cited.
See also page 639.
Clearwater vs. Meredith, 1 Wall., 25.
Peninsular Ry. Co. vs. Thorp, 28 Mich., 506.
Mansfield &c. Co. vs. Drinker, 30 Mich., 124.

The legislature of Michigan could give no such authority to the Indiana company, and if the latter did not also possess the power, then no matter what power the Michigan company possessed, there would be no legal consolidation. Id.

See State vs. Consolidation Coal Co., 46 Md., 1.
Farnum vs. Blackstone Co., 1 Sumner, 42, 62,
State Treasurer vs. Auditor General, 46 Mich., 234.
Ohio & Mississippi R. R. vs. Wheeler, 1 Blk., 286.

2d. It is not alleged that the directors of these corporations entered into any agreement for consolidation as the statute requires, 1 Howell, Sec. 3343; or that the stockholders were called and sanctioned it.

It is clear that complainant must prove that all the formalities required by law were fully complied with.

Green's Bryce, Id., and Michigan cases cited.

And while it is not necessary to set forth in detail, all the several steps, yet as a consolidation could not take place on one day as one act, but is composed of several, each essential step should be alleged. One might be admitted, another denied. Every requirement of the statute must be complied with.

Peninsular Ry. Co. vs. Thorp, 28 Mich., 506.

The essential steps for consolidation are:

1. An agreement entered into between the directors of the two companies, under the seal of each, which must specify certain things.

2. The submission of the same to the stockholders of each company, at meeting to be called, and the approval thereof.

3. Filing a copy thereof with the Secretary of State.

2 Howell's Statutes, Secs. 3343, 3344.

Until these several steps are taken there is no consolidation, and it is only when these several things are shown, that by operation of law, the new or consolidated company succeeds to the rights of the old companies, and becomes subject to their liabilities.

Peninsular Ry. Co. vs. Thorp, 28 Mich., 506.
Mansfield &c. Co. vs. Drinker, 30 Mich., 124.

And they must be averred in the declaration or bill.

M. H. & O. R. R. vs. Langton, 32 Mich., 251.

The learned District Judge fell into an error in fact upon this subject in his opinion (Record p. 25), in saying that the consolidation was effected August 28, 1868, while the bonds were voted in June 1869, and issued in January, 1870; that

the defendant township thus dealt with the consolidated company, and is estopped to question the validity of its organization.

This is true of the first consolidation. But there was a second consolidation, it was alleged, formed on October 8, 1870, with the St. Joseph Valley R. R. Co. (Record pp. 2 and 3.)

It is this last consolidated company that the complainant recovered his judgment against. The defendant township did not vote aid to this corporation, nor recognize it in any way.

The rights, property and franchises of the constitutent companies do not vest in the consolidated company until all statutory formalities are complete. It is not enough that the new company is a corporation de facto, unless there have been dealings with it of such a character as to raise an estopple.

Mansfield, etc., R. R. Co. vs. Drinker 30 Mich., 124.
Rogers vs. Wells, 44 Mich., 411.

Now in the case at bar there have been no dealings whatever between the township and the railroad corporation formed by the second consolidation. The bill does not allege that the requisite steps to entitle the last company to succeed to all the rights of the first company were all properly taken. Nor was this omission merely accidental. The question of the legality of this consolidation has arisen in the Michigan courts and been decided adversly.

Tuttle vs. the Michigan Air Line R. R. Co., 35 Mich., 247, 253.

So we submit with confidence that this last consolidated company is not in a position to enforce whatever rights against the township the old company might have had.

The charge of fraudulent collusion between the township and the State Treasurer in the returning of the bonds to the township, can add nothing to complainant's case. When the township had voted the loan and issued and placed its bonds in the hands of the State Treasurer, it had performed its whole statutory duty to the railroad company; the fact that the Treasurer afterwards, acting under a decision of the Supreme Court, redelivered the bonds to the township, whether upon his own motion or upon the demand of the township is no moment; such action cannot be regarded either as actual or constructive fraud. Whatever rights the railroad company had in the bonds, were in no way impaired by the redelivery of them to the township. There was no fraud which could possibly affect the rights of the railroad company.

Fraud, actual or constructive, which does not prejudice rights, cannot be made ground for equity interference.

Where the act charged, as in this case, does not necessarily import fraud, it will not be presumed.

Gregg vs Saver, 8 Peters 244.

II.

The remedy at law had not been exhausted at the time the present bill was filed.

We concede the general rule to be that the return of an officer upon an execution is conclusive between the parties, and can-

not be disputed. We concede also that the judgment creditor need not point out property to the officer. Putting the execution in the officer's hands is sufficient. It is, however, equally clear that where the officer is directed not to levy on property, or where property is brought to his notice from which his execution may be satisfied, and he does not levy thereon, a creditor's bill to reach equitable assets cannot be maintained. In other words it must appear that the creditor has in good faith completely exhausted his remedy at law.

Freeman vs. Mich. St. Bank, Walker's Ch., 62.
Wharton vs. Fitch, Walker's Ch., 143.
Albany City Bank vs. Dorr, Id., 317.
Adsit vs. Butler, 87 N. Y., 585.
Walser vs. Seligman, 13 Fed. Rep., 415.

If the bill were silent upon this matter, the presumptions would be in favor of regularity. But the present bill shows affirmatively that the judgment debtor possessed ample property when the execution was issued and returned.

The bill alleges that the defendant debtor, on Feb. 1, 1871, had fully constructed and in full operation between Jackson and Niles, 107 miles of road; that it was properly equipped and was regularly operating business upon it, and has continued to until the present time.

And on page 12 it is alleged that one million dollars and upwards were expended in constructing a part of this road. There is no presumption of law that this property is encumbered. There is no allegation or intimation that it is. The presumption is that the pleader has stated his case as strongly as the facts will warrant, and all intendments are against him.

The bill as originally filed did not contain an allegation that

the same was not exhibited by collusion with the defendant, etc., as required by Equity Rule C. C. 6.

This omission was afterwards permitted to be supplied.

See stipulation, record p. 23.

But the amendment thus made was not, nor was the bill as amended, sworn to as required by Equity Rule C. C. 7.

Further than this, it is alleged in the bill that the railroad extended to Niles in the western district.

The Marshal's return is simply that he found no property in his bailiwick.

His district is his bailiwick.

But by statute he has a right to go over into the western district and levy execution on property there.

U. S. Rev. St., Sec. 985.

There is no showing whatever, either in the bill or return, that any steps of this sort have been taken, though the bill alleges that property there existed.

This shows plainly that the remedy at law was not exhausted.

As the basis for a creditor's bill, an execution on a judgment should have been in good faith issued, and should be returned unsatisfied by the officer upon a reasonable and actual but ineffectual effort to find property. If the return shows upon its face a failure in this respect, there is no foundation for equity jurisdiction.

Bassett vs. Orr, 7 Biss. (C. C.) 296.

Here the return, together with the allegations in the bill, show an unexplained failure to take property belonging to the railroad.

These facts should take this case out of the general rule. The Marshal's return, in view of the allegations in the bill, and the omissions as stated, should not be held to show conclusively that complainant had exhausted his remedy at law.

In still other respects the remedy at law had not been exhausted.

It appears from the allegations of the bill that the railroad company, from time to time, as sections of its road were completed, furnished proof thereof to the Governor, and requested his certificate in accordance with the Act, which would entitle the company upon presentation thereof to the State Treasurer, to receive some of the bonds, and that the last application was made to the Governor, February 1, 1871, under which the company would be entitled to all these bonds.

It is also alleged that the Governor admitted that the company had completed its road, and was entitled to the bonds, but refused to issue his certificate, giving as his reason the decision of the Supreme Court in the Salem case. (Record, 8, 9.) (Sec. 6 of the Act, Record p. 12.)

It also appears that the Salem case was decided in the Supreme Court, May 26, 1870, and that the company had notice thereof. (Record, 7.)

The effect of this decision and notice thereof to the corporation, and of the refusal thereof of the Governor to issue his certificate for the reasons stated, was certainly a clear and emphatic notice to the corporation that these bonds would not be delivered to it, by the State Treasurer, or the municipality issuing the same.

The corporation should thereupon have taken prompt steps to protect its interests.

And as it is thus guilty of at least apparent laches, it should set forth its excuse clearly in its bill.

Richards vs. Mackall, 124 U. S., 183.

What remedy then did it have?

An escrow takes effect undoubtedly upon the performance of the condition upon which it is deposited, without any formal delivery by the depository. Suit can then be brought.

Couch vs. Meeker, 2 Conn., 302.
Taylor vs. Thomas, 13 Kan., 317.
Jackson vs. Catlin, 2 Johnson, 248.

If the theory of the present bill be correct, that the corporation after its agreement with the township, and deposit of the bonds with the State Treasurer, by proceeding to construct its road, had thereby acquired a vested interest in the bonds, then the law would surely afford a remedy.

If such facts did not give it a vested interest in the bonds, it would not then or now have any remedy.

But assuming it had acquired such vested interest, and was entitled to the bonds Feb. 1, 1871, then what was its remedy?

I submit it had

First: By mandamus to the State Treasurer.

Second: Possibly by bill to compel a delivery of the bonds, where the facts might be such as to call for the inteference of a Court of Equity.

But again, the bill alleges that on May 28, 1872, the State Treasurer surrendered up and delivered these bonds to the township, which has since then retained and withheld them from the possession of the company.

It is alleged this was done without the knowledge or consent of the corporation, and in fraud of its rights.

It is not stated how long it remained in ignorance of such surrender. Ordinary diligence would have brought to it knowledge of such surrender, and in a case like the present, the corporation must point out why it could not or did not obtain the information, where it seeks to excuse its delay.

New Albany vs. Burke, 11 Wall, 96.
Marsh vs. Whitmore, 21 Wall, 185.
Richards vs. Mackall, 124 U. S., 183.

Upon such surrender being made, perhaps without, but certainly after demand, made on the township, an action of trover would have lain for the conversion of the bonds.

If not destroyed, and perhaps even if destroyed, a bill in equity or mandamus could have been resorted to, to compel a

delivery to the corporation, or if destroyed, a re-issue and delivery.

See a case very similar in its essential facts to the one at bar, and which holds mandamus to be the proper remedy.

Smith vs. Bourbon Co., 127 U. S., 105.

We submit, therefore, that the remedies which the law afforded were not resorted to, and that the present plaintiff is chargeable with the defaults of the corporation.

It may be urged on the part of the plaintiff, that the railroad company would have had to proceed in the State Courts, and that in these, on account of the Salem decision, its rights to the bonds, whatever they might be, probably could not have been enforced.

It is admitted law that for a creditor's bill to be maintainable, all legal remedies must have been exhausted.

Adsit vs. Butler, 87 N. Y., 585.

See also the case of

Taylor vs. Bowker, 111 U. S., 110.

In which this Court lays down the rule very broadly, holding that legal remedies must be formerly exhausted, and this, even when the debtor company had gone out of existence. The Court says, "It is true that the corporate property was

in the possession and charge of the trustees when the execution issued, and the effort to levy it became perhaps a form, but as was well said by the Circuit Judge, it is by no means certain, in view of the strictness with which statutory provisions are often required to be followed, that if this form had been neglected the defendant might not have successfully contended that the complainant had neglected to meet the requirements of the statute." But the Court goes on to say that the trustees might, for ought that the judgment creditors knew, have caused the judgment to be satisfied.

Thus it is clear that the fact that a creditor may believe, even with reason, that proceedings at law would be ineffectual does not excuse him from resorting to such proceedings, and carry them to final termination.

The argument of plaintiff amounts to saying that where there is a strong prospect of failure, one is excused from pursuing his legal rights, *i. e.* that one has a legal remedy when the chances are good for the courts to decide in his favor, and has no legal remedy when the chances are adverse.

If we were to admit this possible contention of complainant, no time would run against these bonds, since the argument that there never was a time when a right of action accrued, would hold equally good at any time.

Its effect also would be to permit the judgment creditor to come upon the townships at any time with greater rights than the railroad had.

This plainly cannot be permitted, for if the railroad cannot collect these bonds, a judgment creditor cannot do it.

The bill cannot be maintained as one to reach equitable assets.

To be such equitable assets, the bonds must by their nature, situation, or holding require the aid of a Court of Equity for their collection, proper distribution or application.

In this case, the refusal of the State Treasurer, or the officers of the township, to deliver the bonds to the railroad company, were at most but breaches of ministerial duty, the remedy for which would be by mandamus, and this complainant could have no greater rights against the State Treasurer or township officers than were vested in the railroad company. Such rights cannot be changed by complainant at his option; nor can he convert a right to require delivery of the bonds, into an equitable action to demand the value or amount.

The equitable nature of complainant's claim as against the railroad company, is not in controversy. The right to proceed against the township is purely a legal right, both on the part of the company and the complainant, and as to complainant the bonds never have been, and are not in any sense equitable assets, subject to be reached by a bill in the nature of a creditor's bill.

Hayward vs. Andrews, 106 U. S., 672–675.
Smith vs. Bourbon County, 127 U. S., 105.

III.

THE STATUTE OF LIMITATIONS AND LACHES.

From the time the Governor refused to give his certificate fourteen years elapsed.

From the time of the surrender up of the bonds by the State Treasurer, thirteen years elapsed.

During all this time no steps were taken.

The last action taken by the company was Feb. 1, 1871, when it demanded from the Governor his certificate, entitling it to the bonds.

This bill was filed March 30, 1885.

The Treasurer surrendered the bonds May 28, 1872, so that no action whatever has been taken by the railroad company for fourteen years, with a view to obtaining the bonds or proceeds.

And nearly thirteen years have elapsed since the bonds were surrendered.

It must be taken as clear that the plaintiff has no rights superior to those of the railroad company.

Smith vs. Bourbon County, 127 U. S., 105, 110.

If the railroad could ever have taken any step to enforce the delivery of these bonds, it could have taken it in February, 1871.

This question has been fully discussed under the last head to which we refer.

Now if a claim sued at law would have been barred, it is barred in equity. This proposition is too clear to require arguments to support it.

Carroll vs. Green, 92 U. S., 509-516.
Godden vs. Kimmel, 99 U. S., 201-210.
Harpening vs. Dutch Church, 15 Peters, 455.
German American Sem. vs. Keifer, 43 Mich, 112.
Webster vs. Gray, 37 Mich., 37.
Dubois vs. Campau, 37 Mich., 248.

It may be laid down as an elementary proposition that a Court will not construe exceptions into a statute of limitations.

(Absence) Sacia vs. Degraff, 1 Conn., 356.
(Infancy) Buckinghamshire vs. Drury, cited in Beckford vs. Wade, 17 Ves., 87.
(Absence) Edwards vs. Ross, 58 Ga., 147.
(Imprisonment) Bledsoe vs. Stokes, 37 Tenn., 312.

"The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long and we believe uniformly exploded. General words in a statute must receive a general construction and if there be no express exception the Court can create none."

Per Chancellor Kent in

Demorest vs. Winkoop, 3 Johns, Ch., 129.

" The Legislature having made no exception, the Courts of justice can make none, as this would be legislating."

Bank of Alabama vs. Dalton, 9 Howard, 522.

So the fact that owing to a holding by the State Courts, delivery of the bonds were probably not enforceable in them, furnishes no reason why the statute of limitations may not run. The legislature has not excepted such cases out of the statute, nor is it desirable that it should, since were it so, rights might be in abeyance in a dormant state for a century, and

then by a change in judicial construction be revived to great annoyance and injustice to innocent parties.

Counsel for complainants insist that the proper remedy was to wait until the maturity of the bonds, and then sue upon them as bonds in the possession of the maker. Even for the moment, admitting that view, recovery on a part of the bonds is conceded to be barred, as the bonds began to fall due after the completion of the road.

The case of New Albany vs. Burk, 11 Wall, 97, discussed under the next head is also in point here.

LACHES.

The laches of the plaintiff forms an insuperable obstacle to his recovery. He is merely a creditor, and can have no greater rights than the railroad company.

Smith vs. Bourbon County, 127 U. S., 105.

Any other view would enable parties to give their creditors a cause of action not possessed by them. The reason of the rule applies to the present case.

Laches is to be determined by the facts of each case, but this Court has frequently laid down the rules which should govern it in such cases.

"There is a defence peculiar to Courts of Equity, founded on lapse of time and the staleness of the claim, where no statute of limitations governs the case. In such cases, Courts of Equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the

claim, or long acquiesence in the assertion of adverse rights. Long acquiesence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment, caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the chancellor."

"The party who makes such appeal should set forth in his bill, specifically, what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent fraudulently to keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in his bill."

Badger vs. Badger, 2 Wall, 87, 94–5.

Lord Camden lays down the rule to be:

"A Court of Equity, which never is active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting, the Court is passive and does nothing; laches and neglect are always discountenanced, and therefore, from the beginning of this jurisdiction, there was always a limitation of suit in this Court."

Quoted with approval in

Howman vs. Walthen, 1 How., 189, 193.
Hayward vs. National Bank, 96 U. S., 611, 618.

The delay of a party in taking proceedings to enforce a contract for a period which would bar an action at law for the property, is, except under special circumstances, such laches as disentitles him to the aid of a Court of Equity.

Preston vs. Preston, 95 U. S., 200.
Godden vs. Kimmell, 99 U. S., 201.

When a complainant has been guilty of apparent laches, his bill should set forth the impediments to an earlier prosecution of his claim, and if it appear at the hearing that the case is liable to the objection of laches on his part, relief will be refused on that ground.

Richards vs. Mackall, 124 U. S., 183.
Marsh vs. Whitmore, 21 Wall., 185.

The circumstances of the cases differing so much, no general rule can be laid down as to what lapse of time will constitute laches.

However, in

Graham vs. R. R. Co., 118 U. S., 161.

a bill filed fourteen years after the beginning of the transaction sought to be impeached, and seven years after its conclusion, was held bad for laches.

And see

Sullivan vs. R. R. Co., 94 U. S., 806.

So a delay of twelve years in

Marsh vs. Whitmore, 21 Wall., 178.

So a delay of nine years.

Burke vs. Smith, 16 Wall., 390.

So a delay of five years.

Harwood vs. R. R. Co., 17 Wall., 99.
Davis vs. Davis, 125 U. S., 90.

So under strong circumstances, a delay of three years and a half.

Hayward vs. National Bank, 96 U. S., 611.

On this subject see also

Brown vs. County of Buena Vista, 95 U. S., 157, 160.

The case most resembling the one at bar, which we have been able to find, is that of

New Albany vs. Burke, 11 Wall., 96.

In this case, the city, in 1853, made a subscription to aid a railroad, the subscription consisting of twenty-year bonds. There was some dispute as to their validity, and certain tax-payers took proceedings to enjoin the levy of any tax to pay interest on them. The company becoming embarrassed, it made an arrangement with the city for the city to take back its bonds, and pay certain cash sums, the railroad then releasing it from liability to issue certain other bonds agreed to be issued. This was done in 1857. A judgment against the railroad was returned *nulla bona* in 1858. In 1868 a purchaser of this judgment filed a bill attacking the settlement between the railroad and the city, and asking an ascertainment of what the city owed on its subscription, and an application of so much as would pay the judgment.

It was claimed that complainant was ignorant of the facts during most of the time. "But he does not say that he had not full possession of the means of detecting the fraudulent arrangement, if it was fraudulent, or that there had been any concealment; and the possession of such means of knowledge is, in equity, the same as knowledge itself."

So the Court holds that there was such laches as to deprive the complainant of whatever rights he might otherwise have.

It is worthy of notice that in this case the point was raised that the bonds did not mature till 1874, and that there was at no time interest enough due on them to pay the amount due on complainant's judgment, up to or about the time the bill was filed. Id. p. 102, at top.

But this argument availed nothing.

When a complainant has been guilty of apparent laches, his bill should set forth the impediments to an earlier prosecution of his claim, and if it appear at the hearing of the case that the case is liable to the objection of laches, on his part, relief will be refused on that ground.

Richards vs. Mackall, 125 U. S., 183.
Marsh vs. Whitmore, 21 Wall., 185.

That this question of laches is properly raised by demurrer, see

National Bank vs. Carpenter, 101 U. S., 567.
Lansdale vs. Smith, 106 U. S., 391.
Speidel vs. Henrici, 120 U. S., 377.

To permit this bill to be maintained would operate with extreme hardship upon the defendant township. The amount subscribed was evenly distributed over a term of years. "This amount, distributed as was contemplated, over a period of ten years, might be easily raised by taxation, while a decree for the entire amount, (with a large amount of accrued interest), rendered *nine* years after the longest bond had matured, would fall with crushing weight upon the township, and upon indi-

viduals who had purchased or dealt with property there upon the theory that the bonds were no longer valid obligations."

The railroad apparently acquiesced in the decision of the Michigan Court that the bonds were invalid. No notice of dissent was ever given, and no demand ever made upon the township for them. They were delivered back to the township. "As no interest had ever been paid upon these bonds, there was nothing to apprise the town that they would ever be enforced until this bill was filed." There has been a negligent sleeping upon questionable rights for many years, until now an ingenious attempt, by a bill which certainly has some of the ear marks of collusion, is made, to realize something out of nothing.

Consider, too, for a moment, the effect of a decree against the township for the full amount claimed.

By the plan as first proposed, the township would have had to pay one thousand dollars principal each year, and a constantly diminishing amount of interest, running from one thousand to one hundred dollars.

If the bonds are now held enforceable, the sum to be paid of principal and interest would be nearly thirty thousand dollars; and this calculation entirely omits the item of interest on overdue coupons, which would be many thousands more.

By the Act authorizing this loan, the principal of these bonds could be made payable in sums not over 2 per cent. of the assessed valuation of the town in one year. By the delay of the company, the sum for which a decree is sought is greatly in excess of this.

IV.

THE RELATIONS BETWEEN THE TOWNSHIP AND RAILROAD WERE NOT THOSE OF DEBTOR AND CREDITOR.—THE BONDS WERE INTENDED AS A LOAN, NOT A DONATION.

The aid voted was by a loan of the bonds of the township, to be repaid by the corporation receiving the loan.

A sum equal pro rata to dividends paid to stockholders, was to be paid the township, ten per cent. of which was to be received and applied in payment of interest upon the loan, and any sum over that amount, to be applied in reduction of the principal, until the principal should be fully paid.

Section one of the statute authorized aid to be pledged "by loan or donation with or without conditions."

It is clear that the aid here voted was a loan.

The condition does not contemplate that the railway company shall pay only in dividends; that if no dividend is declared, or less than ten per cent. annually, then that these bonds shall never be repaid.

These bonds being by way of loan, the company could not sue the township for the amount agreed to be loaned, and this for various reasons.

Where any judgment is recovered, it imports an absolute indebtedness, and upon that subject is conclusive. It is utterly inconsistent with the idea of a loan.

Under such a state of facts, the township is not owing the railroad any liquidated sum whatever.

Stanley vs. Nye, 51 Mich., 235.

Suppose A agrees to execute and deliver his promissory notes for $5,000 to B, payable yearly, but afterwards refuses. Could C, a judgment creditor of B, at the expiration of three years, or at any time, file a creditor's bill against A?

Would such facts constitute equitable assets of B?

There is, however, another important consideration in this connection.

Whatever the construction of the conditions as to payment of the loan by the railroad company may be, still it was a loan, and dividends were looked to for payment, at least in part.

The township was willing to loan the Michigan Air Line Company of that date. As then organized, it may have had a reasonable prospect of repayment.

It might, however, have been wholly unwilling to have made the loan to the new corporation. It might have doubted the ability of the new consolidated company ever to pay any dividends. This has actually happened. (See Record, p. 9.)

Had this been a gift, a donation, the case would be very different. Building the road would then be the sole consideration, and it would be immaterial to the town by whom the road was constructed.

A person has the right to determine the party to whom he will make a loan, and no one, either by legislative authority or otherwise, can give a third party the right to call for the loan or take the place of the debtor.

If A owes B, the latter may well sell his claim to C, as it is wholly immaterial to whom A pays the debt.

And the same is equally true in case of a consolidation, where simply the relation of debtor and creditor exists.

County of Scotland vs. Thomas, 94 U. S., 682.
Clearwater vs. Meredith, 1 Wall., 38.
County of Henry vs. Nicolay, 95 U. S., 619.
Marsh vs. Fulton Co., 10 Wall., 671.
Empire vs. Darlington, 101 U S., 87.
Harshman vs. Bates Co., 92 U. S., 569.
Menecha vs. Hazard, 102 U. S., 104.
Green Co. vs. Converse, 109 U. S., 104.

See

Green's Bryce, 637, and cases cited.

But such would not be the rule in a case like the present, and none of the cases cited cover this point.

The township agreed to loan its credit, to a certain amount, to be evidenced by bonds to be issued to a particular corporation.

While the bonds are deposited in escrow, the corporation to which the loan was to be made went out of existence, and a new corporation was formed.

This last corporation could not compel the town to loan it money bonds on credit.

The statute gave the town authority to pledge its aid in the construction of the road, "*by loan or donation.*" (Sec. 1, Record, p. 10.)

The township pledged its faith and credit, "*by a loan of the sum of ten thousand dollars.*"

We respectfully submit that this Court should not set aside such plain language, or decline to give to it its usual and ordinary meaning; much less to say it really means a donation, and treat it as such.

V.

OFFER WITHDRAWN.

In the case of these bonds, there was an offer by the township to loan its bonds to the road, when that road should have been constructed through the township.

It is an elemetary principle of law that a proposal may be withdrawn at any time before complete acceptance by the party to whom it is made.

Until the road is built through the township of Clarendon, the road is bound to nothing. There is no mutuality. The company need never do anything, if it does not wish to. Only when it has done certain things, the town then agrees to do certain other things.

Now, before the road is completed through the town, the bonds are declared unconstitutional, and the offer may be said thereby to be withdrawn and terminated.

True, the company may have incurred expense in preparing to fulfill the terms of the town's proposal. Possibly if it has thus incurred expense, an action on the case for

damages may lie against the town because of expense entered upon in reliance on the offer.

But the fact that the road has incurred this expense is not tantamount to its having fulfilled the terms of the town's proposal, and so no contract relations ever had any existence between the town and the road.

An unliquidated claim against the township for damages for the withdrawal of the offer, even if it be said that this exists, is not such an indebtedness as can be reached by this bill.

This case, reduced to its simplest form, is simply this: A offers to loan B his note for $10, if B will come and do certain work for him. B buys tools and presents himself prepared to do the work. A withdraws his offer. B surely cannot regard the note as his, and proceed to declare upon it in assumpsit. If he can sue A at all the measure of damages will be the cost of his preparation.

This, in the present case has never been liquidated and determined.

In support of this proposition we refer to the case of

Town of Concord vs. Portsmouth Savings Bank, 92, U. S., 625.

In which the question arose after the adoption of a new constitution which forbade towns to loan their credit. This may be regarded as the same in effect, so far as this question is concerned, as the decision of the Michigan Court in the Salem case.

It is worthy of note that in this case the bonds had been put in market. This Court says: "We do not say that the

new constitution could annul, or impair, any contract that was made between the town and the railroad company during the time in which the town had authority to make it. But the record exhibited no contract made before July 2d, 1870. The town voted on November 20th, 1869, that it would make a donation, provided the company would run its railroad through the town. On June 20th, 1870, the company gave notice of its acceptance of the donation, but the town was not empowered to make the donation until the road was located and constructed through the town. It had no authority to make a contract to give, and the acceptance was an undertaking to do nothing which the company was not bound to do before the authority of the town to make a donation, or to engage to make a donation, came into existence. What is called the acceptance of the railroad company cannot be construed as an engagement to locate and build the railroad through the town. It amounted to no more than saying, If we build our road through your town we will receive your gift. There was, therefore, no consideration for the town's promise to give, even if the popular vote can be be considered as a promise. There was no contract to be impaired."

It is of course proper to call attention to the fact that this Court declined to follow the above decision in

Fairfield vs. County of Gallatin, 100 U. S., 47.

But it will be noticed that the latter case was decided as it is, on account of a prior holding of the State Court, which construed the provisions of the new constitution as requiring the completion of the subscriptions theretofore made.

But the case of Concord vs. Portsmouth expresses the

views of this Court on the question, free from the questions of state decisions and peculiar state constitutional provisions.

See also

I. Parsons on Contracts, 482.
Schuey vs. U. S., 92, U. S., 73.
Eliason vs. Henshaw, 4 Wheaton, 225.

A bidder at an auction may withdraw the bid at any time before the hammer drops.

Paine vs. Cave, 3 Term, 148.

If time be given on one side to accept an offer the other side may withdraw the offer during that time, since up to that time the contract is only an offer. One party cannot be bound without the other.

Rutledge vs. Grant, 4 Bingham, 655.

A New York case is valuable on this point. A was delivering to B, under a contract, a quantity of timber. B agreed to pay A a certain price for some additional timber which A did not promise and undertake to deliver, but which however he proceeded to get out and prepare to deliver. It was held that B's offer did not make a binding contract, as A did not bind himself to sell and deliver the timber; that it was simply an offer on the part of B which could be revoked at any time before a performance or acceptance by A binding upon him.

But the Court said that there was no proof of revocation sufficient to justify taking the case from the jury.

Quick vs. Wheeler, 78 New York, 300.

The Michigan cases are equally clear on this point, the New York case just cited being approved in

McDonald vs. Benich, 51 Mich., 79.

The Court says that the offer in this case was the act of the defendant alone and was not supported by any duty or obligation of the plaintiff or of any other person.

There can be no contract without mutuality.

Finley, etc., Co. vs. Kurtz, 34 Mich., 89.

Where a note is given to aid a railroad, and the railroad is built, the promise would then become operative and the party making the promise would not thereafter be at liberty to repudiate it.

Stevens vs. Corbett, 33 Mich., 458, 461.

See

Michigan, etc., Railroad vs. Bacon, Id., 466.

It will be seen that these two cases are easily distinguishable.

A late case in Michigan fully recognizes the doctrine that "an agreement entered into between parties competent to contract in order to be binding must be mutual. If it appears that the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality."

Wilkinson vs. Hevenrich, 58 Mich., 577.

Citing

Dorsey vs. Packwood, 12 Howard, 126 and numerous cases.

If the railroad company at the time of the Salem decision, or at any time, had refused to proceed further in the construction of its road there was no such binding obligation on its part as would have enabled the township to have compelled it to proceed. It would have simply forfeited its right to insist upon the loan which had been voted.

We will close this branch of the subject by a few quotations from

LANGDELL'S SUMMARY OF CONTRACTS.

§ 4. As the performance of the consideration is what converts an offer into a binding promise, it follows that the promise is made in legal intendment at the moment when the performance of the consideration is completed. It also follows that up to that moment the offer may either be revoked or be destroyed by the death of the offerer, and the offeree thus be deprived of any compensation for what he has done.

Offord vs. Davies, 1 Langdell's Cases 33, (12 C. B. (U. S.) 748.)

As this may cause great hardship and practical injustice, ingenious attempts have been made to show that the offer becomes irrevocable as soon as performance of the consideration begins, (see Offord vs. Davies, supra.); but such a view seems to have no principle to rest upon. Besides there may be hardships on the other side as well; for the offeree may at any stage refuse to proceed farther in performing the consideration, or he may die and then the offerer will confessedly be without remedy. The true protection for both parties is to have a binding contract made before the performance begins by means of mutual promises; and if they neglect this precaution, any hardship that they may suffer should be laid at their own doors. It may be urged, that the offer is accepted (and thus converted into a promise) the moment the performance of the consideration begins; and though the promise at first is not binding for want of a consideration, yet being a promise and not an offer, it is irrevocable, and in the event of the consideration being afterwards performed, it will become

binding. Such a view, however, would be fanciful and unsound. It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied, and in case of offers for a consideration, the performance of the consideration is always deemed a condition. A promise must have a consideration when it is made, or it can never have one. Besides the view in question would not even serve the purposes of substantial justice, as it would protect the offeree while leaving the offerer wholly unprotected.

§ 7. It has been contended that every acceptance of an offer relates back to the time when the offer was first made, and hence that the time of making the offer is always in legal contemplation, the time of making the contract. The doctrine of relation, as invoked by this proposition, is clearly a pure legal fiction, *i. e.* it has no foundation in actual facts to rest upon. It is the acceptance of the offer that makes the contract, as much as it is the delivery that makes a deed. It is true that the offer is indispensable to the making of the contract, but so are writing and sealing indispensable to the making of a deed. It is not, however, a conclusive objection to a relation that it is fictitious, for the law does sometimes create such relations; but it only does so in order to promote justice, *i. e.* in order to prevent some injustice or some inconvenience which would otherwise arise. No such reason can be given in the case in question, certainly not in the absence of any evidence of intention that the contract should take effect at and from some other time than when it was made. But the proposition refutes itself by proving altogether too much, for if it were true, it would follow that an offer could be accepted with effect notwithstanding the death or insanity of the offerer. Nay more, it would follow that an offer never could be revoked to any purpose, for the acceptance, whenever in fact made, would always in legal contemplation precede the revocation.

§ 178. * * * An offer is merely one of the elements of

a contract, and it is indispensable to the making of a contract that the wills of the contracting parties do, in legal contemplation, concur at the moment of making it. An offer, therefore, which the party making it has no power to revoke, is a legal impossibility. Moreover, if a stipulation should make the offer irrevocable, it would be a contract incapable of being broken, which is also a legal impossibility. The only effect, therefore, of such a stipulation, is to give the offeree a claim for damages, if the stipulation be broken by revoking the offer. It is not a contract of which it is possible for equity to enforce specific performance. * * *

VI.

CONSTITUTIONALITY OF BONDS.

The cases in this Court in which the Act of the Legislature of Michigan has been passed upon, are not conclusive upon the validity of these bonds, even when we waive all questions save their constitutionality.

In

Township of Pine Grove vs. Talcott, 19 Wall., 666,

the railroad had earned and received the bonds, and the plaintiff was a bona fide bond-holder, seeking to collect the bonds from the township.

In

Taylor vs. Ypsilanti, 105 U. S., 60,

the railroad company had also completely earned and received the bonds under its contract with the city before the case of People vs. Salem, and Taylor may be said to have been an innocent purchaser for value, since, while he knew of the Salem decision, he also knew that this Court had declined to follow it.

So in

New Buffalo vs. Iron Co., 105 U. S., 73,

the bonds had been issued and the holder was an innocent purchaser for value, and the contract had been fully performed before the Salem case was decided.

Thus it will be seen that the two principal reasons for holding the bonds good in those cases are absent here; for here the bonds were not issued, and so never got on the market and passed from hand to hand in the course of business. No rights ever grew up in regard to them. So also there is no question here of an innocent purchaser for value claiming rights from a defaulting municipality.

These bonds were deposited with the State Treasurer, to be delivered upon the performance of certain things.

If a note were thus deposited under a void authority, and before the actual delivery thereof, the authority were declared void, its delivery could not be enforced.

Yet if delivered and negotiated, it could be collected.

The rights of holders of railroad aid bonds are to be

determined by the law as it was judicially construed when the bonds were put on the market as commercial paper.

Green Co. vs. Conness, 109 U. S., 104.
Douglass vs. Pike Co., 101 U. S., 677, 687.

Now, here the bonds, when a time was reached at which they were ready to be put on the market, were declared unconstitutional by the State Supreme Court.

This Court refused to follow this decision as to their constitutionality, where the bonds had been issued and nogotiated. See cases cited above.

But where they have not been issued, and where no rights of bona fide purchasers are involved, it is submitted that this Court should follow the authority of the settled State adjudications.

And see

1 Dillon, Municipal Corporations, Secs. 515, 517, 164.

To sum up, then, the legal propositions which we have submitted:

I. The consolidation is improperly and insufficiently alleged.

II. The remedy at law had not been exhausted at the time this bill was filed.

1. The bill shows that the principal debtor had ample property in this district.

2. The bill also shows property in the Western District, while the Marshal's return does not state that he went there.

3. The company, or those claiming through it, should have taken legal proceedings to enforce its rights to the bonds. This would have been by mandamus—or trover.

4. The bill cannot be maintained as one to reach equitable assets.

5. Recovery on the bonds is barred by Statute of Limitations, and by the railroad's laches.

6. No relations of debtor and creditor ever arose between the town and railroad, since the bonds were to be a loan, not a donation.

7. No valid, vested right to these bonds ever accrued to the railroad, since before they were earned, the town's offer was withdrawn.

8. This Court should follow the State Court's decision as to their unconstitutionality, since they had never been put on the market, and no question of the rights of a bona fide purchaser is in the case.

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APPENDIX.

HOWELL'S STATUTES.

§3343. SECTION 29. Any railroad company in this State, forming a continuous or connected line with any other railroad company, may consolidate with such other company, either in or out of this State, or partly within and partly without this State, into a single corporation. *Provided*, that no such companies owning parallel or competing lines shall be permitted to consolidate themselves into one corporation. The directors of said two or more corporations may enter into an agreement, under the corporate seal of each, for the consolidation of said two or more corporations, prescribing the terms and conditions thereof, the mode of carrying the same into effect, the name of the new corporation, the number of directors thereof, and the names of those who shall be the first directors, which shall be deemed and taken to be the first election of the directors of the consolidated company; which number shall not be less than five nor more than fifteen the time and place of holding the first election of directors after the consolidation, which time shall not exceed six months after such consolidation has been sanctioned by the stockholders of said two or more corporations, as hereinafter provided; the number of shares of capital stock in the new corporation; the amount of each share; the manner of converting the shares of capital stock in each of said two or more corporations into shares in such new corporation; with such other details as they shall deem necessary to perfect such consolidation of said corporations; and such new corporation shall possess all the powers, rights, and franchises conferred upon such two or more corporations; and shall be subject to all the restrictions and perform all the

duties imposed by the provisions of their respective charters, or laws of organization, not inconsistent with the provisions of this Act. Such agreement of the directors shall not be deemed to be the agreement of the said two or more corporations until after it has been submitted to the stockholders of each of said corporations separately, at a meeting thereof, to be called upon a notice by publication at least once in each week for four successive weeks, in one of the daily papers published in the the city of Detroit, and some newspaper published in each county in this State through which said roads run, in which a newspaper shall be published; the first publication to be at least sixty days before the time specified for said meeting, and signed by the secretaries of each of said companies proposing to consolidate, stating the purpose and object of said meeting, and has been sanctioned by such stockholders, by a vote of a majority in interest of the stockholders in person or by proxy, each share of capital stock being entitled to one vote; and when such agreement of the directors has been so sanctioned by each of the meetings of the stockholders separately, in the manner above mentioned, then such agreement of the directors shall be deemed to be the agreement of the said two or more corporations. A copy of said contract or consolidation agreement filed in pursuance of this Act, or of an Act entitled "An Act to provide for the incorporation of railroad companies," approved February tweive, eighteen hundred and fifty-five, and the Acts amendatory thereof, and the Acts amending or revising the same, with the Secretary of State, and certified by him to be a copy, shall in all courts and places be presumptive evidence of the consolidation of said two or more companies, and of all the facts therein stated. And, *provided*, that any railroad bridge company, or railroad tunnel company which may be organized under this Act to bridge or tunnel the Detroit river, or the St. Clair, or any of the waters in the jurisdiction of this State shall have the right to consolidate the stock, property and assets of said company with the stock, pro-

perty and asserts of any company organized or to be organized under the laws of this State, or which may be created under the laws of any adjacent State or country, to construct any such bridge or tunnel therewith, upon such terms, conditions, and agreements as may by the said two corporations be deemed just and equitable: *Provided*, that every such bridge or tunnel shall be so constructed as not to be a material obstruction to navigation.

§3344. SEC. 30. Upon making the agreement mentioned in the preceding section, in the manner required therein, and filing a duplicate thereof in the office of the Secretary of State, the said two or more corporations mentioned or referred to in this section shall be merged in the new corporation provided for in such agreement, to be known by the corporate name therein mentioned, and the details of such agreement shall be carried into effect as provided therein. And all and singular, the rights and franchises of each and all of said two or more corporations, parties to such agreement, and all and singular their rights and interests in and to every species of property and things in action, shall be deemed to be transferred to and vested in such new corporation, without any other deed or transfer; and such new corporation shall hold and enjoy the same, together with all the rights of way and all other rights of property, in the same manner and to the same intent as if the said two or more corporations, parties to such agreement, should have continued to retain the title and transact the business of such corporation; and the titles and the real estate acquired by either of said two or more corporations shall not be deemed to revert or be impaired by means of anything in this act contained: *Provided*, That all rights of creditors, and all liens upon the property of either of said corporations, parties to the said agreement, shall be and hereby are preserved unimpaired, and the respective corporations shall continue to exist so far as may be necessary to enforce the same; and, *Provided further*, That all the debts, liabilities,

and duties of either company shall thenceforth attach to such new corporation, and be enforced against the same, to the same extent and in the same manner as if such debts, liabilities, and duties had been originally incurred by it.